United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

599 No. 17598

JAMES K. TALLMAN, ALICE P. TALLMAN, CHRISTINE FLEISCHER, WILLIAM O. RABOURN, HARRY B. COCKRUM, BAILEY E. BELL, JAMES G. CARLSON, MICHAEL F. BIERNE, JAMES E. O'MALLEY, and WALDO E. COYLE,

Appellants,

vs.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Appellee.

Appeals From The United States District Court
For The District of Columbia

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Relevant Docket Entries

June 8, 1962	-	Complaint with attached Exhibits A through G, CA 1852-62
July 18, 1962	-	Defendant's motion to dismiss
August 23, 1962	-	Plaintiffs' motion for summary judgment
August 23, 1962	-	Statement under Rule 9(h) to accompany plaintiffs' motion for summary judgment
September 4, 1962	-	Defendant's motion for summary judgment
September 4, 1962	-	Defendant's statement and counterstatement under Rule 9(h) of material facts as to which there is no genuine issue in support of defendant's motion for summary judgment
September 4, 1962	-	Defendant's response to plaintiffs' statement of material facts.
October 16, 1962	-	Memorandum by Judge Charles F. McLaughlin
November 1, 1962	-	Judgment by Judge Charles F. McLaughlin
December 31, 1962	-	Notice of appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES K. TALLMAN, 1132 H Street, Anchorage, Alaska; ALICE P. TALLMAN, 1132 H Street, Anchorage, Alaska; CHRISTINE FLEISCHER, Palmer, Alaska; WILLIAM O. RABOURN, c/o Bell, Sanders & Tallman, Box 1599, Anchorage, Alaska; HARRY B. COCKRUM, 3705 N. Massachusetts Avenue, Portland 17, Oregon; BAILEY E. BELL, 213 Central Building, Box 1599, Anchorage, Alaska; JAMES G. CARLSON, c/o William H. Sanders, Box 1599, Anchorage, Alaska; MICHAEL F. BEIRNE, 918 - 10th Avenue, Anchorage, Alaska; JAMES E. O'MALLEY, 213 Central Building, Box 1599, Anchorage, Alaska; and WALDO E. COYLE, Box 166, Kenai, Alaska

as individuals,
Plaintiffs

v.

STEWART L. UDALL
SECRETARY OF THE INTERIOR
WASHINGTON, D. C.

Defendant

Civil Action
No. 1852 - '62

Filed June 8, 1962

COMPLAINT FOR REVIEW, FOR DECLARATORY JUDGMENT, AND FOR INJUNCTIVE RELIEF

The plaintiffs for their complaint represent as follows:

1. The plaintiffs are citizens of the United States and residents of the State of Alaska, except Harry B. Cockrum who is a resident of Oregon.

2. The defendant is the Secretary of the Interior of the United States and as such is charged with the administration of the laws relating to the public lands, including the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 30 U.S.C. §181, et seq., as amended, and the Pickett Act of June 25, 1910, as amended 43 U.S.C. §§ 141-142. The official residence of the defendant is the District of Columbia.

3. The matter in controversy, exclusive of interest and costs, exceeds $10,000.

4. The jurisdiction of the Court is invoked under Title 11, Section 306 of the District of Columbia Code; upon the ground of diversity of citizenship, and upon the further ground that the construction and interpretation of federal statutes, executive orders, and regulations are involved and required. Plaintiffs seek relief under the terms of section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. §1009, and under the terms of 28 U.S.C. §§ 2201 and 2202 relating to Declaratory Judgments. The Court has jurisdiction also by virtue of its inherent power to grant injunctive relief in the premises.

5. This case is concerned with the unlawful, unreasonable and arbitrary action of the defendant in failing and refusing to issue to each of the plaintiffs an oil and gas lease covering 2560 acres of public land in Alaska to which each of the plaintiffs, as a respective first qualified applicant therefor, is entitled under the statutes, executive order, and regulations hereinafter referred to, and under the decisions, rulings and declared policy of the Department of the Interior.

6. The land in suit embraces 2560 acres for each plaintiff, or a total of 25,600 acres, more or less, in the northern part of the Kenai National Moose Range. At all times herein material the 25,600 acres were public lands of the United States believed to contain oil and gas deposits and were not within any known geologic structure of a producing oil or gas field. The land in suit is more particularly described in Appendix A annexed hereto and made a part of this complaint.

7. Under the Act of August 8, 1946, section 3, 60 Stat. 951, 30 U.S.C. §226, amendatory of the Mineral Leasing Act, the Secretary of the Interior is authorized to lease such oil and gas lands when open to leasing under the Mineral Leasing Act. The Act mandatorily requires that:

> "... When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding."
> (Emphasis supplied.)

Under the Act and long standing administrative decisions no application for an oil and gas lease under this section may be made of public lands reserved from oil and gas leasing, and a lease application for such closed lands grants the applicant no preference right over a subsequent applicant who submits the first application for the lands after the lands are open to oil and gas leasing.

8. The Kenai National Moose Reserve was established on December 16, 1941 by Executive Order No. 8979 (6 F. R. 6471) issued by President

Franklin Delano Roosevelt. The Executive Order provided that none of the lands within the Reserve, with certain exceptions,

> "shall be subject to settlement, location, sale or entry, or other disposition ... under any of the public land laws applicable to Alaska ..."

Executive Order No. 8979 establishing the Reserve was promulgated pursuant to the power of the President under the 1910 Pickett Act, supra, as well as his inherent power under the Constitution, to withdraw lands from leasing under the Mineral Leasing Act and other public land laws for purposes such as wildlife refuges.

9. By Executive Order No. 10355 of May 26, 1952 (17 F. R. 4831) the President delegated to the Secretary of the Interior his power

> "... to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." (Emphasis supplied.)

Under Departmental Regulations (24 F. R. 1348, Departmental Manual, §§ 200.2.1, 210.1.1, 210.1.2, 210.2.2A(4)(a)) the Secretary of the Interior has redelegated the authority delegated to him by the President in Executive Order No. 10355 relating to the creation or revocation of reservations of public lands to the Under Secretary and certain Assistant Secretaries but has expressly not redelegated this power to the Solicitor or Deputy Solicitor of the Department.

10. On July 24, 1958 (published in the Federal Register of August 2, 1958) the Secretary of the Interior issued an order (23 F. R. 5883) with

respect to the Kenai National Moose Reserve which expressly provided:

> "Closed Area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:" (Emphasis supplied.)

The lands listed as "not opened" were in the southern part of the Reserve.

As to the lands in the northern part of the Reserve, wherein the 25,600 acres involved in the present action lay, the Order provided:

> "... lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 A.M., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlines in the regulation 43CFR 295.8."

The "agreement and map" were noted on the records on August 4, 1958, so that the lands involved in this case first became open to lease offers on August 14, 1958. The July 24, 1958 order under which the lands were opened followed new regulations pertaining to wildlife lands in general (Circular 1990, 43 CFR 192.9, January 8, 1958) and a classification by the Secretary in January, 1958, (attached and made part hereto as Exhibit B) deciding that the northern part of the Kenai Moose Range "will be opened."

11. Plaintiffs duly filed their respective offers to lease on or after August 14, 1958 in accordance with the procedure specified in the Secretary's Order of July 24, 1958, supra. Their applications were the first received

by the Bureau of Land Management after the lands had been opened by the Secretary for lease offers. On September 4, 1959 the Bureau of Land Management issued a "Notice of Public Drawing" to "determine priorities between simultaneously filed oil and gas lease offers," which specifically included plaintiffs' applications. A copy of this Notice is annexed as Exhibit C and made a part of this complaint. The drawing was held on September 14, 1959. Subsequent to the drawing, plaintiffs remained the first lease applicants for the respective lands applied for of those applicants filing after August 14, 1958.

12. However, in decisions dated October 1, 5 and 7, 1959, the Chief, Minerals Adjudication Unit, Anchorage Land Office, rejected the plaintiffs' lease offers for the reason that they conflicted with leases issued during the fall of 1958, based on offers filed on various dates between October 15, 1954 and January 28, 1955.

13. Plaintiffs duly appealed to the Director of the Bureau of Land Management in accordance with the Department's rules of practice. By decisions by the Director and Acting Director dated July 21, 1960, July 15, 1960 and July 15, 1960, respectively, the decisions by the Chief of the Minerals Adjudication Unit, Anchorage was affirmed. The Director and Acting Director in rejecting plaintiffs' appeal stated that the lands involved were "opened to leasing within the Kenai National Moose Range, Alaska" pursuant to Circular 1990 of January 8, 1958. (See paragraph 10, supra.) Copies of these decisions are annexed as Exhibit D and made a part of this complaint.

14. Thereafter plaintiffs duly appealed to the Secretary of the Interior in accordance with the Department's rules of practice. The Secretary of Interior never acted upon the appeals. Instead a Deputy Solicitor of the Department of the Interior in an opinion dated September 1, 1961 rejected plaintiffs' appeals on different grounds from those asserted by the Director and Acting Director of the Bureau of Land Management. The Deputy Solicitor concluded that the lands within the Kenai National Moose Reserve withdrawn by Executive Order No. 8979 of December 16, 1941 were open to oil and gas leasing during 1954 and 1955 when the offers were filed upon which leases were issued in September 1958, because "nothing in the withdrawal specifically excludes those lands from the scope of the act." (A copy is attached as Exhibit E and made a part of this complaint.) Under Departmental Regulations discussed supra, paragraph 9, the Deputy Solicitor had no authority to open the Reserve. Plaintiffs' appeals to the Secretary of the Interior for the issuance of leases could have been rejected by the Deputy Solicitor for the Secretary only if the Kenai National Moose Range had been validly opened by the President or Secretary of the Interior to oil and gas leasing in 1954 and 1955.

15. Subsequent to the opinion of the Deputy Solicitor, plaintiffs undertook an investigation of the matters therein for the first time cited. As a result thereof, plaintiffs then, pursuant to Departmental procedures, duly filed a petition for exercise of supervisory authority with the defendant Secretary of the Interior on the grounds (1) that newly

discovered evidence from National Archives reveals that it was the intent of President Roosevelt in establishing the Kenai National Moose Reserve by Executive Order in 1941 that it be closed to leasing under the Mineral Leasing Act; (2) that the Deputy Solicitor lacked authority to decide plaintiffs appeals to the Secretary; and (3) that the Deputy Solicitor's purported decision conflicts with other decisions by Assistant Secretaries and other officials within the Department - a conflict which only the Secretary could resolve. A copy of plaintiffs' petition is attached hereto as Exhibit F as part of this complaint. In a decision dated April 25, 1962, again signed by the same Deputy Solicitor, plaintiffs' petition for exercise of supervisory authority, although allegedly considered on its merits, was denied. A copy of the decision of April 25, 1962 is attached hereto as Exhibit G as part of this complaint.

16. Plaintiffs have exhausted their administrative remedies.

17. The refusal of the defendant Secretary of the Interior to grant plaintiffs' petition for exercise of fupervisory authority, thereby rejecting plaintiffs' lease offers and refusing to issue noncompetitive oil and gas leases to plaintiffs as the first qualified applicants is unlawful, arbitrary, unreasonable and discriminatory, is in violation of the express and mandatory provisions of the Mineral Leasing Act of 1920, as amended, the Picket Act of 1910, as amended, and the applicable Executive Orders and regulations, and is contrary to the decisions, rulings and established administrative practice of the Department of the Interior. The unlawful and improper actions of the defendant herein complained of are particularized as follows:

(1) In failing to rule that the new evidence from National Archives shows that the 1941 Executive Order establishing the Kenai National Moose Reserve closed the Reserve to oil and gas leasing offers until opened by the Secretary in his order issued July 24, 1958, although the decisions cited by the Deputy Solicitor in his opinion of September 1, 1961 relied upon such evidence in relation to established judicial construction of such orders, in deciding that the Reserve was previously open in 1954 and 1955.

(2) In refusing to recognize his own regulations and controlling law which grant no authority to a Deputy Solicitor to modify or revoke the Executive Order of 1941 establishing the Kenai National Moose Reserve so as to retroactively declare the Reserve open to oil and gas lease offers in 1954 and 1955 as a basis for the rejection of plaintiffs' lease offers made in August, 1958. As a consequence the Deputy Solicitor had no authority to decide plaintiffs' appeals to the Secretary.

(3) In failing to correct the purported opinion of the Deputy Solicitor rejecting plaintiffs' appeals which conflicted with other decisions by Departmental officials.

WHEREFORE, plaintiffs pray:

1. That the Court review the action of the defendant in accordance with the provisions of section 10 of the Administrative Procedure Act (5 U.S.C. §1009);

2. That it be declared and adjudged that the defendant violated the provisions of the Mineral Leasing Act, the Pickett Act, and the applicable Executive Orders and Departmental regulations in refusing to grant plaintiffs' petition for exercise of supervisory authority and thereby ruling that the Kenai National Moose Reserve was open to oil and gas lease offers in 1954 and 1955 before opened by Order of the Secretary of July 24, 1958, published in the Federal Register of August 2, 1958;

3. That it be declared and adjudged that the Deputy Solicitor of the Department lacked authority to declare the Kenai National Moose Reserve open to oil and gas leases in 1954 and 1955, and lacking such authority could not validly decide and reject plaintiffs' appeals to the Secretary for the issuance of leases to them as the first qualified applicants;

4. That it be declared and adjudged that defendant violated section 17 of the Mineral Leasing Act of 1920 as amended in rejecting plaintiffs' lease offers.

5. That the defendant be directed to reinstate plaintiffs' lease offers and to issue noncompetitive oil and gas leases to plaintiffs as the first qualified applicants if their lease offers are otherwise regular and complete; or in the alternative that the defendant be directed to decide plaintiffs' appeals;

6. That the defendant pay to the plaintiffs the costs of this action;

7. That the plaintiffs have such other and further relief as is just and equitable.

/s/
Charles F. Wheatley, Jr.
1203 Walker Building
Washington 5, D. C.

DISTRICT OF COLUMBIA) D.D.:

Charles F. Wheatley, Jr., being first duly sworn, deposes and sys that he is one of the attorneys of the plaintiffs herein, that the plaintiffs are residents of Alaska and are absent from the District of Columbia, that affiant read the foregoing complaint by him subscribed and that he knows the contents thereof and that the matters and things therein stated he verily believes to be true.

/s/
Charles F. Wheatley, Jr.

Subscribed and sworn to before me this 8 day of June, 1962.

Notary Public - DC

My Commission expires _____

OIL AND GAS LEASE APPEALS

JAMES K. TALLMAN - Anchorage 044843 - 2560 acres

Territory of Alaska - T.6N., R9W., Seward Meridian

Beginning at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward. Meridian, Third Judicial Division of Alaska, thence running true North a distance of two miles (10560'), thence West a distance of two miles (10560'), thence South a distance of two miles (10560'),thence East two miles (10560') to the place of beginning. The approximate legal subdivisions of said tract being Sections 25, 26, 35 and 36, Township Six North (T6N), Range Nine West (R9W), of the Seward Meridian, if and when surveyed.

ALICE P. TALLMAN - Anchorage 044844 - 2560 acres

Territory of Alaska - T6N, R10W, Seward Meridian

Beginning at the Northeast Corner of Section 1, Township 5 North, Range 10 West, of the Seward Meridian, Third Judicial Division of Alaska, thence running true North a distance of two miles (10560'), thence West a distance of two miles (10560'), thence South a distance of two miles (10560'), thence East two miles (10560'), to the place of beginning. The approximate legal subdivisions of said tract being Sections 25, 26, 35 and 36, Township Six North (T6N), Range 10 West, (R10W), of the Seward Meridian, if and when surveyed.

CHRISTINE FLEISCHER - Anchorage 044842 - 2560 acres

Territory of Alaska - T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward Meridian, Third Judicial Division of Alaska, thence running true North a distance of four miles (21120') to the true point of beginning, thence West a distance of two miles (10560') thence East a distance North 2 miles(10560') of two miles (10560'), thence South two miles (10560') to the point of beginning. The approximate legal subdivisionsof said tract being Sections 1,2, 11 and 12, Township Six North, Range 9 West, of the Seward Meridian, if and when surveyed.

WILLIAM O. RABOURN - Anchorage 044845 - 2560 acres

Territory of Alaska - T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running true North a distance of 2 miles (10560') to the true point of beginning, thence West a distance of 2 miles (10560'), thence North a distance of 2 miles (10560'), thence East 2 miles (10560'), thence South 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 13, 14, 23 and 24, Township 6 North, Range 9 West of the Seward Meridian, if and when surveyed.

HARRY B. COCKRUM-- Anchorage 044846 - 2560 acres

Territory of Alaska - T6N, R9W,Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence West two miles (10560') to the true point of beginning, thence North two Miles (10560'), thence West two miles (10560'), thence South two miles (10560'), thence East two miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 27,28, 33 and 34, Township 6 North, Range 9 West, of the Seward Meridian, if and when surveyed.

BAILEY E. BELL - Anchorage 044847 - 2560 acres

Territory of Alaska - R6N, R9W, Seward Meridian

Commencing at the NE Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120') to the true point of beginning, thence North 2 miles (10560'), thence West 2 miles (10560'), thence South 2 miles (10560'), thence East 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 29,30,31 and 32, T6N, R9W, of the Seward Meridian, if and when surveyed.

JAMES G. CARLSON - Anchorage 044848 - 2560 acres

Territory of Alaska - T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward Meridian, Third Judicial Division of Alaska, thence running West two miles (10560'), thence North four miles (21120'), to the true point of beginning, thence West two miles (10560'), thence North two miles (10560'), thence East two miles (10560'), thence South two miles (10560'), to the point of beginning. The approximate legal subdivisions of said tract being Sections 3, 4, 9 and 10, Township 6 North, Range 9 West of the Seward Meridian, if and when surveyed.

MICHAEL F. BEIRNE - Anchorage 044849 - 2560 acres

Commencing at the Northeast Corner of Sec. 1, Twsp. 5 N, Range 9 W, of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120'), thence North 2 miles (10560') to the true point of beginning, thence West 2 miles (10560'), thence North 2 miles (10560') thence East 2 miles (10560') , thence South 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 17, 18, 19 and 20, T6N, R9W of the Seward Meridian, if and when surveyed.

JAMES E. O'MALLEY - Anchorage 044850 - 2560 acres

Territory of Alaska - T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Sec. 1, Twsp. 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120'), thence North 4 miles (21120'), to the true point of beginning, thence West two miles (10560'), thence North 2 miles (10560'), thence East 2 miles (10560'), thence South 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being all of Sections 5, 6, 7 and 8 of Twsp. 6 N, Range 9 W, of the Seward Meridian, if and when surveyed.

WALDO E. COYLE - Anchorage 045178 - 2400.81 acres

Alaska - T5N, R11W, Seward Meridian

Sec. 9, Lots 3, 4, 5, 6 & NE-1/4 SW-1/4
S-1/2NE-1/4, S-1/2SW-1/4, SE-1/4

Sec. 10, N-1/2NE-1/4, SE-1/4. SE-1/4, Lots 4,5,6,8,9,10,11

Sec. 11, Lots 1 thru 9 and N1/2 NW-1/4, SE1-/4 SW-1/4
W-1/2 NE-1/4. NE-1/4SE-1/4, E-1/2 SW-1/4

Sec. 14, Lots 1 thru 7, 9, 10, 12

Sec. 16, Lots 1 thru 10, NW-1/4NW-1/4, SE-1/4 SW-1/4

Sec. 18, SW-1/4SE-1/4, E-1/2 SE-1/4

Sec. 19, Lots 7, 8, 9, 11, 13 and SE-1/4 NE-1/4 SE-1/4

Sec. 36, Lots 1 thru 8 and SW1-/4 SE-1/4

DEPARTMENT OF THE INTERIOR

INFORMATION SERVICE

STATEMENT BY SECRETARY OF THE INTERIOR FRED A. SEATON ON OIL AND GAS LEASING ON THE KENAI MOOSE RANGE, ALASKA, JANUARY 29, 1958

I have approved this week a classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development. The closed section--about 1,689 square miles--includes all areas on which the Fish and Wildlife Service believes oil and gas development would be incompatible with wildlife management purposes.

In those areas of the Kenai Moose Range open to oil and gas leasing--about 1,525 square miles--operations will be subject to stipulations which provide maximum protection for fish and wildlife.

The lands open to leasing lie primarily north of the Sterling Highway and include the current oil-producing area and two proposed new unit areas. Also included in the open areas will be the Swanson River Valley, lands around the towns of Kenai and Kasilof, and the Soldonata area. All good spawning and rearing areas for salmon will be protected, and important waterfowl areas will be preserved. Also, because of its scenic beauty, an area at Bedlam Lake will be closed.

I am assured by Assistant Secretary Leffler that this action opening a portion of the Kenai range subject to the proposed regulated development is entirely consistent with the primary purpose for which the range is managed.

A map showing the locations of the open and closed areas is attached.

As of today no classifications of other areas have been completed. The Fish and Wildlife Service, the Bureau of Land Management and the Geological Survey, as I advised you at our last press conference, are proceeding as rapidly as possible on classification procedures for other wildlife lands.

When the classification procedures have been completed and approved, they will be sent to the field personnel of the Fish and Wildlife Service, the Bureau of Land Management, and the Geological Survey. We will seek a speedy, but thorough, classification. It will be made initially by employees who know land and wildlife values, assisted by technicians who can judge properly the possibility of mineral occurrences. The final decision in all classifications, of course, rests with the Secretary of the Interior.

x x x

Exhibit B

KENAI NATIONAL MOOSE RANGE

U.S. DEPARTMENT OF THE INTERIOR — FISH AND WILDLIFE SERVICE

ALASKA

R5W — R1W — R1E

T10N

T5N

T1N

T1S

T5S

INLET

TRADING BAY

REDOUBT BAY

KALGIN I.

COOK

TURNAGAIN ARM

ANCHORAGE

MERIDIAN

CHUGACH

SEWARD NATIONAL FOREST

SEWARD BASE LINE

SEWARD

KENAI MOUNTAINS

BLYING SOUND

KACHEMAK BAY

KACHEMAN

ALASKA

GULF OF ALASKA

TERRITORY OF ALASKA

CANADA

PACIFIC OCEAN

LEGEND

RANGE BOUNDARY

AREA OPEN TO MINERAL LEASING JAN. 28, 1956

R1S W

SEWARD MERIDIAN

COMPILED IN THE DIVISION OF LAND ACQUISITION BASE BY U.S.D.A. FOREST SERVICE

WASHINGTON, D.C. JUNE ..... APRIL 1962

Scale

MEAN DECLINATION 1934

IN REPLY REFER TO:
ALO:M4

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
334 E. Fifth Avenue
Anchorage, Alaska

SEP · 1959

NOTICE OF PUBLIC DRAWING

Horace C. Allen, Jr., et al. : Anchorage 045221, et al.
: Oil & Gas

Numerous oil and gas lease offers 1/ were filed during the simultaneous period established in accordance with the agreement classifying the lands in the Kenai National Moose Range, Alaska, for oil and gas leasing purposes, pursuant to the regulations, 43 CFR 192.9 (Circular 1990), approved by the Secretary on January 8, 1958.

43 CFR 192.9(b)(3) and (c) state in pertinent part as follows:

"Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records."

The records were noted August 4, 1958, therefore, all offers filed for these lands on or after 10:00 A.M., August 14, 1958 and until and including 10:00 A.M. on the tenth day thereafter, which in this instance must be Monday, August 25, 1958, as the land office was not open Sunday, August 24, 1958, are considered as simultaneously filed.

A public drawing is required to determine priorities between simultaneously filed oil and gas lease offers, therefore, such a drawing will be held involving the oil and gas offers in question 1/ at the Anchorage Land Office, 334 E. Fifth Avenue, Anchorage, Alaska, in accordance with the governing regulations, 43 CFR 295.8(c), at 2:00 P.M., September 14, 1959.

A defective oil and gas lease offer will not afford the offeror priority until the defect is cured, therefore, the public drawing will be held to establish priority for issuance of leases and will in no way validate a defective application when the offer is reached for adjudication.

No notice of the results of this drawing will be mailed to the offerors listed. However, a tabulation indicating the established priority awarded will be posted on the bulletin board of the Anchorage Land Office and will remain posted for thirty days from the date of the drawing.

Irving W. Anderson
Manager

1/ The names & addresses of the offerors and serial numbers of their respective oil & gas lease offers appear in Appendix "A", attached hereto.

APPENDIX "A"

Name & Address	Serial Number
Horace C. Allen, Jr. 971 Tucson Aurora, Colorado	Anchorage 045221
James D. Alderman 3990 Otis Wheatridge, Colorado	Anchorage 045201
Bailey E. Bell 213 Central Building, Box 1599 Anchorage, Alaska	Anchorage 044847
Dr. Michael F. Beirne 918 - 10th Avenue Anchorage, Alaska	Anchorage 044849
John H. Brunel 2985 Reed Street Denver 15, Colorado	Anchorage 045217
J. M. Bryan 10 Requa Place Piedmont, California	Anchorage 045245, 045246 045247, 045248, 045249, 045251, 045252, 045253, 045254, 045255, 045256, 045257, 045258, 045259, 045260, 045261, 045262, 045263, 045264
James G. Carlson c/o William H. Sanders Box 1599 Anchorage, Alaska	Anchorage 044848
Donald D. Church RFD Wasilla, Alaska	Anchorage 044968, 044969
O. Etola Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045163
Dale R. Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045164, 045165

Thelma E. Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045166
James E. Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045167
Harry B. Cockrum 3705 N. Massechusetts Avenue Portland 17, Oregon	Anchorage 044846
Waldo E. Coyle Box 166 Kenai, Alaska	Anchorage 045169, 045170, 045171, 045172*, 045174, 045175, 045176, 045177, 045178
Jaye F. Dyer 9230 West 9th Denver 15, Colorado	Anchorage 045216
Sal Eisenberg 636 N. La Brea Avenue Los Angeles, California	Anchorage 045098, 045100*, 045124, 045149
Jean Erickson 726 K Street Anchorage, Alaska	Anchorage 045369, 045370, 045371, 045372, 045373, 045374, 045375, 045376, 045377, 045378, 045379*, 045380, 045381, 045382, 045383
Anthony Evanco Box 1545 Anchorage, Alaska	Anchorage 045059, 045060, 045061, 045062
Mrs. Christine Fleischer Palmer, Alaska	Anchorage 044842
H. Roland Glaiser & Alfred V. Hagen Westward Hotel Anchorage, Alaska	Anchorage 045279, 045280, 045281, 045282, 045283
Harry G. Gadlove P. O. Box 1091 Anchorage, Alaska	Anchorage 044978
Maurice Mac Goodstein 405 N. Palm Drive Beverly Hills, California	Anchorage 045086, 045113*, 045132, 045136, 045137, 045148

Jane Goodstein 405 N. Palm Drive Beverly Hills, California	Anchorage 045090, 045109 045112
W. Pershing Grace 2095 Oakland Aurora, Colorado	Anchorage 045223
L. E. Grammer Box 787 Anchorage, Alaska	Anchorage 044851, 044852, 044853, 044854
Virginia Gratias Box 843 Anchorage, Alaska	Anchorage 045181
W. H. Gregory & Alfred V. Hagen Box 38 Anchorage, Alaska	Anchorage 045160
Rose Haimes 612 S. Hauser Los Angeles, California	Anchorage 045125, 045127
Charles M. Heard 2555 Cody Court Denver 15, Colorado	Anchorage 045220, 045228
R. A. Hildebrand Box 1648 Grand Junction, Colorado	Anchorage 045051, 045154
Sam Joseph 178 N. Clark Beverly Hills, California	Anchorage 045118, 045122 045139, 045140
Harold Koslosky 810 M Street Anchorage, Alaska	Anchorage 045349, 045350
Henry H. Knackstedt Box 52 Kenai, Alaska	Anchorage 045179, 045180
C. V. Lindorff 2420 S. Ogden Street Denver 10, Colorado	Anchorage 045219, 045227
Don R. Link 841 Petroleum Club Building Denver, Colorado	Anchorage 045192

J. R. Mann 1312 Bank of the Southwest Building Houston 2, Texas	Anchorage 044945
Glenn S. Miller 112 W. Ray Street Seattle 99, Washington	Anchorage 045285
Robert A. Moffett 7720 Brookhill Road Downey, California	Anchorage 045105, 045107, 045145, 045146
Clarabell Murdock 1388 S. Zuni Denver 23, Colorado	Anchorage 045182, 045186, 045190*, 045198
Vera G. Nelson 620 D. Street Anchorage, Alaska	Anchorage 045157
Lawrence W. Nelson Alfred V. Hagen Box 1561 Anchorage, Alaska	Anchorage 045367
Newton H. Neustadter, Jr. 60 Sea Cliff Avenue San Francisco, California	Anchorage 045053, 045054, 045055, 045056, 045058
Ohio Oil Company 550 S. Flower Street Los Angeles 17, California	Anchorage 044986, 044987, 044988, 044989, 044990, 044991
James E. O'Malley 213 Central Building, Box 1599 Anchorage, Alaska	Anchorage 044850
George Orling 232 No. Almont Beverly Hills, California	Anchorage 045099, 045103
Sanford Orling 178 N. Clark Beverly Hills, California	Anchorage 045143, 045144
C. A. Patchen 3459 S. Fairfax Denver 22, Colorado	Anchorage 045218
Glenn R. Penland Box 1753 Anchorage, Alaska	Anchorage 045361, 045362, 045363, 045364

Pexco Inc. 155 Montgomery Street San Francisco, California	Anchorage	045230*, 045231, 045233, 045234, 045235, 045236, 045237, 045238, 045240, 045241, 045242, 045244 045243*
Howard K. Phillips 1115 First National Bank Building Denver 2, Colorado	Anchorage	045225
Harry J. Pursell Box 320 Anchorage, Alaska	Anchorage	045310
William O. Rabourn c/o Bell, Sanders & Tallman Box 1599 Anchorage, Alaska	Anchorage	044845
Alva D. Saxton Alfred V. Hagen Box 1847 Palmer, Alaska	Anchorage	045161
Charles Schraier 3036 Watseka Avenue Los Angeles, California	Anchorage	045087, 045097
John I. Schumacher Box 1648 Grand Junction, Colorado	Anchorage	045052, 045064, 045065, 045066
Roy S. Scott, Jr. 1115 - 1st National Bank Building Denver 2, Colorado	Anchorage	045224
Adele Silverman 2657 S. Bedford Los Angeles, California	Anchorage	045123, 045133, 045135, 045151
Floyd D. Smith Box 66 Wasilla, Alaska	Anchorage	044981, 044982, 044983, 044984
Betty J. Spelta 2207 Alder Cir. Drive Anchorage, Alaska	Anchorage	045286
Burl C. Stephens, Jr. P. O. Box 2083 Anchorage, Alaska	Anchorage	045295

Mrs. Sue Strickler 11739 Hortense North Hollywood, California	Anchorage 045089, 045092, 045119, 045128
James C. Strickler 11739 Hortense North Hollywood, California	Anchorage 045091*, 045111, 045131, 045191
James K. Tallman 1132 H Street Anchorage, Alaska	Anchorage 044843
Alice P. Tallman 1132 H Street Anchorage, Alaska	Anchorage 044844
Robert F. Thurrell, Jr. 239 S. Dahlia Street Denver 22, Colorado	Anchorage 044874, 044785, 044876, 044879, 044880, 045185, 045187, 045188, 045193, 045194, 045195, 045197
Frank P. Turner 2585 South Newton Denver 19, Colorado	Anchorage 045222
Union Oil Co. of California Union Oil Center P. O. Box 7600 Los Angeles 54, California	Anchorage 045204, 045205, 045206, 045207, 045208, 045209*, 045210, 045211
Viola M. Vermillion 4311 LeMont Circle Bellaire, Texas	Anchorage 044941, 044942, 044943, 044944
Jack V. Walker Box 2256 Anchorage, Alaska	Anchorage 045158
John E. Walters 8314 Winninghan Houston 24, Texas	Anchorage 044948, 044949, 044950, 044951
Louise L. Watson 739 Revere Aurora, Colorado	Anchorage 045183, 045184, 045196, 045199
T. Stanton Wilson Box 1753 Anchorage, Alaska	Anchorage 045351, 045352, 045353, 045354, 045355, 045356, 045357, 045358, 045359

Asterisk (*) indicates only a portion of offer within Executive Order 8979 to be considered in simultaneous drawing.

UNITED STATES
DEPARTMENT OF THE INTIRIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Anchorage 044843
044844
5.043

July 15, 1960

Certified Mail
Return Receipt Requested

DECISION

James K. Taliman
Alice P. Taliman

Oil and Gas

Decisions Affirmed

The above named parties have appealed from separate decisions of the Chief, Minerals Adjudication Unit, Anchorage Land Office, dated October 7, 1959, which rejected oil and gas lease offers Anchorage 044843 and 044844 filed August 14, 1958, under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers for unsurveyed lands in areas open to leasing within the Kenai National Moose Range, Alaska (Circular 1990, 43 CFR 192.9(d)) were rejected for the reason that the lands are embraced in leases Anchorage 028080 and 028082 issued effective September 1, 1958, pursuant to prior filed offers pending on January 10, 1958 (43 CFR 192.9(d) and (e)). The decisions stated that the issued leases embrace the nontidal navigable waters within their exterior boundaries pursuant to timely exercised preference rights granted by section 6 of the Act of July 3, 1958 (Public Law 85-505; 72 Stat. 332) and the appellants' offers to this extent were also rejected.

The appellants contend that Anchorage 028080 and 028082 are an absolute nullity because the offers were filed prior to the opening of the lands to leasing. They also state that the leases having issued for 25 cents an acre while their offers were filed for 50 cents an acre was arbitrary, willful and intentional give away of public property and the leases should be rescinded.

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the appellants' offers for the reasons stated. The appellants' contentions to the contrary are not meritorious including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the Act of July 3, 1958 (72 Stat. 322) expressly provides that a rental rate of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers pending on May 3, 1958. See Solicitor's Opinion, M-36523 (August 1, 1958). The first year rental rate of 50 cents per acre is required with respect to all offers filed on or after May 3, 1958. J. W. Bauler et al., 66 I.D. 377 (1959).

Accordingly, the decisions of the Chief, Minerals Adjudication Unit, rejecting the appellants' offer were proper and are hereby affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1395. If an appeal is taken the amount of the filing fee will be $5.00 in each case. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Alice P. Tallman then the adverse party to be served is:

Hal W. Stewart
306 East McPherson
Findlay, Ohio

If an appeal is taken by James K. Tallman then the adverse party to be served is:

D. J. Griffin
221 E. Lincoln Street
Findlay, Ohio

Acting Director

Enclosure

DISTRIBUTION:

Mr. James K. Tallman (Certified Mail)
Mrs. Alice P. Tallman (Certified Mail)
Mr. Hal W. Stewart (Regular Mail)
Mr. D. J. Griffin (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
WJ

76861-60

In reply refer to:

Anchorage 044842 and
044845 through 044850
5.04g

July 21, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

Christine Fleischer
William O. Rabourn
Harry B. Cockrum
Bailey E. Bell
James A. Carlson
Michael F. Bearne
James E. O'Malley

DECISION

Oil and Gas

Decisions Affirmed

The above-named parties appealed from separate decisions of the Chief, Minerals Adjudication Unit, Anchorage Land Office, dated October 1 and 5, 1959, which rejected the above-noted oil and gas lease offers, filed August 14, 1958, under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers for unsurveyed lands in the areas opened to leasing within the Kenai National Moose Range, Alaska (Circular 1990, 43 CFR 192.9(d)) were rejected for the reason that the lands applied for are embraced in leases 1/ (listed) which issued pursuant to prior filed offers pending on January 10, 1958 (43 CFR 192.9(d) and (e). The decisions stated further that the leases embraced the non-tidal navigable waters within their exterior boundaries pursuant to timely exercised preference rights granted by section 6 of the act of July 3, 1958 (Public Law 85-505; 72 Stat. 322) and the appellants offers to this extent were also rejected.

The appellants do not dispute the facts, however, they contend, in effect, that the issued leases are an absolute nullity because the offers were filed prior to the opening of the land within the Kenai National

1/ Anchorage 044848 held to be in conflict with 028988 is corrected to show the conflict is with Anchorage 028983 - the records further show that Anchorage 028986 and 028991 were partly segregated into Anchorage 051421 and 051423, respectively.

Moose Range to leasing. Furthermore, the leases issued for 25 cents an acre while the appellants offers were filed for 50 cents an acre was an arbitrary, wilful and intentional giveaway of public property and the leases should be considered void.

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the appellants offers for the reason stated. The appellants contentions to the contrary are not meritorious including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the act of July 3, 1958 (72 Stat. 322) expressly provides that rental of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers filed prior to and pending on May 3, 1958. See Solicitor's Opinion, M-36523 (August 1, 1958). 1/

Accordingly, the decisions of the Chief, Minerals Adjudication Unit, rejecting the offers were proper and they are hereby affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each lease offer included in the appeal. If the appeal covers all offers adversely affected by this decision the total filing fee is $35. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken by the appellant listed then the adverse party or parties shown opposite the appellant's name must be served:

Appellant	Party to be served
Christine Fleischer (Anchorage 044842)	Fred W. Axford (Anchorage 028986 & Anchorage 051421) 12368 North Melody Lane Los Altos Hills, California
William O. Rebourn (Anchorage 044845)	Fred W. Axford (Anchorage 029000) (Same address as above)
Harry B. Cockrum (Anchorage 044846)	Doris L. Erwin, Trustee (Anchorage 028150) 525 3rd Avenue Anchorage, Alaska

1/ The 50 cent per acre rental applies to all lease offers filed on or after May 3, 1958. J. W. Bauler et al., 66 I.D. 377 (1959).

Appellant	Party to be served
Bailey E. Bell (Anchorage 044847)	W. B. Emery II (Anchorage 028081) 4418 Frazier Avenue Bakersfield, California
James G. Carlson (Anchorage 044843)	Fred W. Axford (Anchorage 028983) 12368 North Melody Lane Los Altos Hills, California
Micheel F. Beirne, M. D. (Anchorage 044849)	Fred W. Axford (Anchorage 023991 & 051423) (Same address as above)
	Michael T. Halbouty (Anchorage 028953, 028955) 5111 Westheimer Road Houston, Texas
	King Oil, Inc. (Anchorage 028953, 028955) 620 Oil and Gas Building Wichita Falls, Texas
James E. O'Malley (Anchorage 044850)	Fred W. Axford (Anchorage 029001, 028991, 051423) (Same address as above)

Edmund Notzon
Director

Enclosures

DISTRIBUTION:

James K. Tallman, Attorney for the appellants (Certified Mail)
Mrs. Christine Fleischer (Regular Mail)
William O. Rabourn (Regular Mail)
Harry B. Cockrum (Regular Mail)
Bailey E. Bell (Regular Mail)
James G. Carlson (Regular Mail)
Michael F. Beirne (Regular Mail)
James E. O'Malley (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
WJ

In reply refer to:
Anchorage 045178
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 15, 1960

Certified Mail
Return Receipt Requested

DECISION

Waldo E. Coyle : Oil and Gas

Decision Affirmed

Mr. Waldo E. Coyle has appealed from a decision of the Chief, Minerals Adjudication Unit, Anchorage Land Office, dated October 13, 1959, which rejected oil and gas lease offer Anchorage 045178 filed August 22, 1958, 1/ as to those lands applied for in the areas opened to leasing within the Kenai National Moose Range, Alaska, (Circular 1990, 43 CFR 192.9(d) held to be in conflict with leases Anchorage 028103, 028138, 028140, 045643 and 046693 which issued pursuant to prior filed offers pending on January 10, 1958 (43 CFR 192.9(d) and (e)).

In his appeal, appellant does not dispute the facts, however, he contends in effect that the issued leases are an absolute nullity because the offers therein were filed prior to the opening of the land within the Kenai National Moose Range to leasing. Furthermore, the leases having issued for 25 cents an acre while his offer was filed for 50 cents an acre was an arbitrary, wilful and intentional give away of public property and the leases should be considered void.

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the offer for the reasons stated. The appellants contentions to the contrary are not meritorious including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the Act of July 3, 1958 (72 Stat. 322) expressly provides that rental of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers pending on May 3, 1958. See Solicitor's Opinion, M-36523 (August 1, 1958). The 50 cents per acre rental is required with respect to all offers filed on or after May 3, 1958. J. W. Bauler et al., 66 I.D. 377 (1959).

1/ Under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).

Exhibit D.

Accordingly, the decision of the Chief, Minerals Adjudication Unit, rejecting the offer for the aforementioned reasons was proper and it is hereby affirmed.

Mr. Coyle is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5.00. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Coyle thea the adverse parties to be served are:

Estate of E. Wells Ervin
C/o Doris Lee Ervin
Arnell & Burr Law Office
204 Turnagain Arms
Anchorage, Alaska

M. B. Kirkpatrick
525 3rd Ave.
Anchorage, Alaska

Acting Director

Enclosure

DISTRIBUTION:

James K. Tallman, Bell, Sanders & Tallman, Attorneys at Law (Certified Mail)
Mr. Waldo E. Coyle (Regular Mail)
Mr. D. A. Burr, Arnell & Burr, Attorneys at Law (Regular Mail)
Estate of E. Wells Ervin (Regular Mail)
M. B. Kirkpatrick (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
WJ

97839-61

JAMES K. TALLMAN ET AL

A-28594
A-28609
A-28619

Decided SEP 1 1961

Oil and Gas Leases: Lands Subject to--Wildlife Refuges and Projects--Withdrawals and Reservations: Effect of

Public land withdrawn for the protection of wildlife is not thereby removed from the operation of the Mineral Leasing Act and, in the absence of affirmative action by the Department closing the area to oil and gas leasing, offers to lease the land for oil and gas purposes may be filed.

Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior may, in his discretion, refuse to lease land reserved for a particular purpose but subject to leasing under the Mineral Leasing Act where such leasing would be incompatible with the purpose for which the land is reserved.

Oil and Gas Leases: Applications

Offers to lease lands which were at the time of filing open to the filing of such offers are entitled to prior consideration over offers filed at a later date, following an interim when the area was closed to the filing of such offers.

Oil and Gas Leases: Rentals

Offers to lease lands in Alaska filed prior to and pending on May 3, 1958, are entitled to the benefit of section 10 of the act of July 3, 1958, notwithstanding the fact that action on such offers had been suspended by the Department.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28594		
James K. Tallman	:	Anchorage 044843
Alice P. Tallman	:	Anchorage 044844
A-28609		
Christine Fleischer	:	Anchorage 044842
William O. Rabourn	:	Anchorage 044845
Harry B. Cockrum	:	Anchorage 044846
Bailey E. Bell	:	Anchorage 044847
James G. Carlson	:	Anchorage 044848
Michael F. Beirne	:	Anchorage 044849
James E. O'Malley	:	Anchorage 044850
A-28619		
Waldo E. Coyle	:	Anchorage 045178
	:	Oil and gas lease offers
	:	rejected.
	:	Affirmed.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

James K. Tallman and others have appealed to the Secretary of the Interior from decisions of the Director and the Acting Director of the Bureau of Land Management affirming decisions of the Anchorage, Alaska, land office in rejecting their offers, filed on or after August 14, 1958, to lease for oil and gas purposes lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers were rejected because they conflicted with leases issued during the fall of 1958, based on offers filed on various dates between October 15, 1954, and January 28, 1955.

The appellants contend that the leases based on the prior offers are null and void because the lands were not open for the filing of offers when those offers were filed. They contend that they, the appellants, are the first qualified applicants for the lands. They contend, further, that the prior offers, having been suspended, were not "pending" offers within the meaning of section 10 of the act of July 3, 1958 (72 Stat. 322, 324), amending section 22 of the Mineral Leasing Act (30 U. S. C., 1958 ed., sec. 251), and that it was error to have issued those leases at a rental of 25 cents per acre for the first year of the leases.

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The Moose Range was established on December 16, 1941, by Executive Order No. 8979 (6 F. R. 6471). The lands described in the order were, "for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose of the Kenai Peninsula, Alaska, * * *" withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose.

The order provides, with respect to a large part of the Range, that those lands shall not be subject to settlement, location, sale, or entry or other disposition under any of the public land laws applicable to Alaska or for classification or use under enumerated laws applicable only to Alaska. 1/ Small portions of the Range were left available for settlement, location, sale, or entry, with the proviso that those lands were to be classified. Those lands classified as not suitable for settlement were no longer to be available for that purpose. 2/

The establishment of the Range did not have the effect of removing the lands therein from the operation of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 et seq.). This is so because nothing in the withdrawal specifically excludes those lands from the scope of the act. While such lands are open for leasing under the terms of the Mineral Leasing Act in the sense that offers to lease such lands may be filed, the Secretary of the Interior may, in the exercise of the discretion vested in him by the act, refuse to issue leases covering such reserved areas where the mineral development of the lands might seriously impair or destroy the purpose for which the lands are reserved. West Central Corporation, A-28523 (February 2, 1961); Noel Teuscher et al, 62 I.D. 210 (1955); Martin Wolfe, 49 L.D. 625 (1923). 3/

Thus unless some action taken after the Range was established and before these prior offers were filed closed the lands covered by

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1/ All of the prior offers involved in these appeals except those in conflict with the Coyle offer (Anchorage 045178) cover lands in this category.

2/ The prior offers in conflict with Coyle's offer cover land left available for settlement, location, sale or entry.

3/ That the Secretary's discretion in the matter of the leasing of lands subject to the operation of the Mineral Leasing Act remains unimpaired, notwithstanding the material revision of that act in 1946, has recently been affirmed by the United States Court of Appeals, District of Columbia Circuit, in Haley v. Seaton, 281 F. 2d 620, 625 (1960).

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those offers to the filing of oil and gas lease offers, there was no prohibition against the filing of these prior offers.4/

The only action taken by the Department with respect to lands reserved for the protection of wildlife, but otherwise available for leasing subject to such requirements as might be imposed for the protection and use of the lands for the purpose for which they were reserved (43 CFR 191.5; 43 CFR 192.9), was the suspension, on August 31, 1953, of action on all pending offers for oil and gas leases covering lands within wildlife refuges. This suspension was put into effect because of a study then in progress by the Department to determine whether there should be a revision in the policy of leasing such lands. That suspension did not prohibit the filing of offers to lease such lands but merely ordered the managers of the various land offices not to issue leases on refuge lands. Although that suspension was in effect when the offers in conflict with the appellant's offers were filed, it can not be said that the lands covered by those offers were not open to the filing of such offers on the various dates on which those offers were filed.

4/ Appellants contend that Public Land Order 487 of June 16, 1948 (13 F. R. 3462), Public Land Order 1212 of September 9, 1955 (20 F. R. 6795), and an amendment thereof on October 14, 1955 (20 F. R. 7904), indicate an intention on the part of the Department not to open the Range, or at least that part of the Range affected by Public Land Order 487, to mineral leasing applications. Only the land involved in the Coyle offer was affected by Public Land Order 487. That order temporarily withdrew certain land in the Range, including the land covered by prior offers in conflict with the Coyle offer, which had theretofore been available for settlement, location, sale, or entry, from such settlement, location, sale or entry and reserved the land for classfication, examination, and in aid of proposed legislation. The order provided that it took precedence over but did not modify the reservation for the Moose Range. However, Public Land Order 487 did not withdraw the land affected thereby from the operation of the Mineral Leasing Act or close that land to the filing of oil and gas lease applications any more than Executive Order No. 8979 did. The prior offers in conflict with the Coyle offer were filed while Public Land Order 487 was in effect.

Public Land Order 1212 revoked Public Land Order 487 and opened the lands for acquisition under specified laws and subject to the conditions set forth therein. Although Public Land Order 1212, as first published, appeared to delay the opening of the lands affected thereby to mineral leasing, the amendment of the order, deleting the language referring to mineral leasing, makes it clear that the order was intended to have no such effect.

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A-28619

The appellants have not pointed to, and I am not aware of, any action taken by the Department subsequent to the filing of the offers in 1954 and 1955 which would have required the rejection of these offers.

The regulation (43 CFR 192.9) relating to the leasing for oil and gas purposes of lands set aside for the protection of wildlife was amended on December 2, 1955 (20 F. R. 9009), to make certain of those areas unavailable for leasing under the terms of the Mineral Leasing Act, to provide that leases would be issued covering certain other designated areas only upon the approval of complete and detailed operating programs for those areas, and to set forth the conditions which must be expressed in any leases issued covering the balance of the lands set aside as wildlife refuges. Although that amendment set forth the determination that only those areas designated in Appendix A thereto would no longer be available for oil and gas leasing,5/ the suspension on the issuance of leases on lands remaining open to leasing was reimposed early in 1956.

On January 8, 1958, the regulation was again amended (23 F.R. 227; 43 CFR, 1959 Supp., 192.9). That regulation defines the various types of lands covered thereby, including Alaska wildlife areas, which are:

> "areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service." (Sec. 192.9(a)(4).)

The regulation then sets forth the leasing policy and procedure which will be followed with respect to the various categories of the areas defined. In so far as the regulation is pertinent to the present appeals, it provides that as to the Alaska wildlife areas (into which the Range naturally falls) representatives of the Bureau of Land Management and the United States Fish and Wildlife Service would confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing but that no such agreement would be effective until approved by the Secretary of the Interior (sec. 192.9(b)(3)); that those lands not closed to leasing would be subject to lease on the imposition of stipulations agreed upon by the two aforementioned agencies of the Department (sec. 192.9(b)(4); that the agreements referred to in sec. 192.9(b)(3) shall be published in the Federal Register and shall contain a description of the lands affected thereby which are not subject to oil and

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5/ The lands involved in the present appeals are not among those lands designated as being unavailable for leasing.

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gas leasing together with a statement of the stipulations agreed upon for inclusion in leases covering lands which shall remain available for leasing, to insure that all operations under such leases shall be carried out in such manner as will result in the minimum of damage to wildlife resources; that the agreements, as supplemented by maps or plats specifically delineating the lands, will be filed in the appropriate land office, and that:

> "Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records." (Sec. 192.9(c).)

Finally, the regulation provides:

> "All pending offers or applications heretofore filed for oil and gas leases covering * * * Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b)(3) of this section shall have been completed." (Sec. 192.9(d).)

Thus it was not until the oil and gas leasing regulations were amended on January 8, 1958, that the Kenai National Moose Range was closed to the filing of oil and gas lease offers and the amendment specifically preserved the priorities of all pending offers.

On August 2, 1958, a notice dated July 24, 1958, that an agreement had been consummated, classifying lands within the Kenai Range as to their availability for oil and gas leasing purposes, was published in the Federal Register (23 F. R. 5883). There the Secretary designated those lands within the Range closed to oil and gas leasing. The remaining lands, including all lands involved in the present appeals, were again made subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act, the regulations in 43 CFR, Part 192, and the provisions of the notice. The notice specifically stated:

> "Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations."

The notice further provided that lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office and that all lease offers filed in that office on that day and for ten days thereafter would be treated as having been filed simultaneously.

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The agreement and the map were noted on the Anchorage land office records on August 4, 1958, and it was within the ten-day period following August 14, 1958, that the appellants' offers were filed. The appellants were on notice at the time they filed their offers that if there were offers pending covering the lands included in their offers those offers would receive priority of consideration under that regulation in Part 192 which prohibits the issuance of an oil and gas lease before final action has been taken on any prior offer to lease the land (43 CFR 192.42(m)), under the specific provisions of the January 6, 1958, amendment of 43 CFR 192.9, and under the specific terms of the notice making a portion of the lands within the Kenai National Moose Range available for oil and gas leasing.

In the circumstances, it was proper to have issued leases based on the pending offers, all else being regular.

The point raised by the appellants as to whether the leases based on the pending offers were properly issued at a rental of twenty-five cents per acre for the first year of the lease terms requires little discussion. The appellants belabor the difference between a suspended offer and a pending offer. They argue that the twenty-five cent rental applies only to those offers which were pending because the land office had not had the opportunity to process such offers and that it can not be applied to those offers on which the land office had been directed to take no action.

The act makes no such distinction. Under the provisions of the Mineral Leasing Act in effect when the prior offers were filed noncompetitive leases were conditioned upon the payment of advance rentals of not less than twenty-five cents per acre per annum. However, section 22 of the act, known as the Alaska Oil Proviso, authorized the Secretary of the Interior to fix the rental covering noncompetitive leases in Alaska and authorized him, in his discretion, to waive the payment of any rental for the first five years of any such leases. By regulation, the Secretary had fixed the rental of noncompetitive leases covering lands in the continental United States at fifty cents per acre for the first lease year and had fixed the rental on noncompetitive leases covering lands in Alaska at twenty-five cents per acre (43 CFR 192.80). Section 10 of the act of July 3, 1958, amended section 22 of the Mineral Leasing Act to provide:

> " * * * That the annual lease rentals for lands in the Territory of Alaska not within any known geological structure of a producing oil or gas field and the royalty payments from production of oil or gas sold or removed from such lands shall be identical with those prescribed for such leases covering similar lands in the States of the United States, except that leases which may issue pursuant

A-28594
A-28609
A-28619

> to applications or offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958, shall require the payment of twenty-five cents per acre as lease rental for the first year of such leases; but the aforesaid exception shall not apply in any way to royalties to be required under leases which may issue pursuant to offers or applications filed prior to May 3, 1958. * * *"

The offers on which the leases questioned in these appeals were based were "filed prior to and were pending on May 3, 1958." Thus they meet the test of the statute. The fact that action on those offers was suspended by the Department did not deprive the offers of their status as pending offers and it can not deprive the offerors of the benefits of the statute.

Accordingly, it was not error to have issued the leases at a rental of twenty-five cents per acre for the first lease year.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed.

(Sgd) Edward W. Fisher
Deputy Solicitor

McCARTY AND WHEATLEY
COUNSELLORS AT LAW
WALKER BUILDING
734 FIFTEENTH STREET, N. W.
WASHINGTON 5, D. C.

ROBERT L. McCARTY
CHARLES F. WHEATLEY, JR.

METROPOLITAN 8-5862

February 15, 1962

The Honorable Stewart L. Udall
Secretary of the Interior
Washington 25, D. C.

My dear Mr. Secretary:

Enclosed herewith please find a petition for the exercise of your supervisory authority to correct serious errors in the administration of the public land laws pertaining to the Kenai National Moose Reserve, Alaska.

Respectfully submitted,

Charles F. Wheatley, Jr.

CFW:eb

Enclosure

Exhibit F

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28594		
James K. Tallman	:	Anchorage 044843
Alice P. Tallman	:	Anchorage 044844
A-28609		
	:	Anchorage 044842
Christine Fleischer	:	Anchorage 044845
William O. Rabourn	:	Anchorage 044846
Harry B. Cockrum	:	Anchorage 044847
Bailey E. Bell	:	Anchorage 044848
James G. Carlson	:	Anchorage 044849
Michael F. Bierne	:	Anchorage 044850
James E. O'Malley		
A-28619		
Waldo E. Coyle	:	Anchorage 045178

PETITION FOR EXERCISE OF SUPERVISORY AUTHORITY

The above parties respectfully petition the Secretary of the Interior to exercise his supervisory authority to correct serious errors in the administration of the public land laws entrusted to him by the President and Congress.[1/] Petitioners duly appealed to the Secretary objecting to the issuance of oil and gas leases under section 17 of the Mineral Leasing Act, as amended, on lands within the Kenai National Moose Range, Alaska, pursuant to applications by representatives of various major oil companies in 1954 and 1955, prior to the time that the lands were first considered as available for such leasing by Order of Secretary Seaton dated July 24, 1958 (23 F. R. 5883). Petitioners were the first duly qualified applicants for such leases under the procedures for filing of lease offers set forth in the Order of July 24, 1958, their applications filed on or after August 14, 1958. In a purported attempt to exercise the authority of the Secretary, a deputy solicitor of the Department rejected petitioners'

1/ See 43 C. F. R. §221.78.

appeals to the Secretary and approved the granting of oil and gas leases on lands within the Kenai National Moose Range pursuant to the applications submitted in 1954 and 1955. The petitioners respectfully submit that the Secretary should exercise his supervisory authority on all or any of the following grounds: (1) newly discovered evidence reveals that it was the intent of President Roosevelt in establishing the Kenai National Moose Reserve to close it to disposition under the Mineral Leasing Law, unless opened thereto by order of the Secretary of the Interior; (2) the deputy solicitor lacked authority to decide petitioners' appeals to the Secretary so that there has been no valid decision on the Secretarial level of petitioners' appeals; and (3) the deputy solicitor's purported decision conflicts with other decisions within the Department of Assistant Secretaries -- a conflict which the Secretary should resolve in exercise of his supervisory authority for the proper administration of the Department. The grounds will be discussed in order below.

I. NEWLY DISCOVERED EVIDENCE REVEALS THAT IT WAS THE INTENT OF PRESIDENT ROOSEVELT IN ESTABLISHING THE KENAI NATIONAL MOOSE RESERVE BY EXECUTIVE ORDER IN 1941 THAT IT BE CLOSED TO ALL FORMS OF DISPOSITION UNDER THE PUBLIC LAND LAWS, INCLUDING THE MINERAL LEASING LAWS.

The deputy solicitor's purported decision rejecting petitioners' appeals to the Secretary concluded that the Kenai National Moose Range was open to oil and gas leasing at all times on the following grounds:

> "The establishment of the Range did not have the effect of removing the lands therein from the operation of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 et seq.). This is so because nothing in the withdrawal specifically excludes those lands from the scope of the act. While such lands are open for leasing under the terms of the Mineral Leasing Act in the sense that offers to lease such lands may be filed, the Secretary of the Interior may, in the exercise of the discretion vested in him by

> the act, refuse to issue leases covering such reserved areas where the mineral development of the lands might seriously impair or destroy the purpose for which the lands are reserved. West Central Corporation, A-28523 (February 2, 1961); Noel Teuscher et al, 62 I. D. 210 (1955); Martin Wolfe, 49 L. D. 625 (1923)." (Decision of September 1, 1961, p. 2)

A search of the Presidential and Secretarial files at the National Archives pertaining to the establishment of the Kenai National Moose Reserve discloses new evidence which reveals that the lands withdrawn for the Reserve were not intended to be open for acquisition or disposition under any of the public land laws, thereby necessarily including the mineral leasing laws. The Reserve was initially proposed by the Fish and Wildlife Service of the Department of the Interior. In a Memorandum for the Secretary dated January 18, 1941, Mr. Gabrielson, Director of the Fish and Wildlife Service, explained the purpose of the withdrawal for the Kenai National Moose Range in clear and unmistakable language:

> "The draft proclamation as now drawn differs somewhat from that as considered by the General Land Office in that the strip of land 6 miles wide along the shores of Cook Inlet and Kachemak Bay, which was omitted from the proposed refuge in the first draft, is now included because it would be impossible to administer the refuge with this undefined boundary. The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available for use and disposition pursuant to the public land laws applicable to Alaska. Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale, or other disposition under any of the public land laws applicable to Alaska and from classification and lease under the provisions of the acts of July 3, 1926 (44 Stat. 821, 48 U.S.C. Sup. 360-361) entitled 'Act to provide for the lease of public lands in Alaska for fur farming and other purposes', and of March 4, 1927 (44 Stat. 1452, 48 U.S.C. Sup. 471-471o) entitled 'An act to provide for the protection, development, and utilization of public lands in Alaska by establishing an adequate system of grazing livestock thereon.'.

* * * * * *

> "I recommend that if the action meets with your approval the draft of the proposed proclamation be forwarded to the President." (Emphasis supplied; see Exhibit A attached.)

It would be difficult to imagine any language of intent expressed more clearly -- the Reserve in the Director's view, other than the 6 mile strip where the public land laws applicable to Alaska would apply, was to be withdrawn from any "disposition" under "any of the public land laws applicable to Alaska."[1/] The final Executive Order issued by President Roosevelt on December 16, 1941 to establish the Reserve, expressly adopted the language proposed and explained by the Fish and Wildlife Service Director:

> "By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for study in its natural environment of the practical management of a big game species that has considerable local value, all of the hreinafter-described areas of land and water of the United States lying on the northwest portion of said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and Alaska Game Commission as a refuge and breeding ground for moose . . . .
>
> "None of the above-described lands excepting Tps 5N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled

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1/ The Teuscher case (62 I. D. 210 (1955)) cited by the deputy solicitor relied extensively on a similar type supporting document in order to construe the meaning of the Executive Order withdrawing lands there involved. See 62 I. D. at 213. Why the deputy solicitor in the present case did not turn to such "legislative history" of the Executive Order establishing the Kenai Moose Reserve is difficult to understand, except for the fact that the files involved had been transferred to National Archives. See also P & G Mining Co., 67 I. D. 217, 219 (1960).

'An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes', 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska for establishing an adequate system for grazing livestock thereon', 44 Stat. 1452, U.S.C., title 48, secs. 471-4710: Provided, however, That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: . . ." (Executive Order No. 8979, dated December 16, 1941, 6 F.R. 6471; emphasis supplied.) 1/

The express intent of the withdrawal to close the lands embraced therein to disposition under the mineral leasing laws as one of the applicable public-land laws in Alaska 2/adopting the clear intent as expressed by the Director of the Fish and Wildlife Service, is further confirmed by the established accepted interpretation of the meaning of the language used in 1941 when the Order was promulgated. The words providing that "None of the . . . lands . . . shall be subject to settlement, location, sale, or entry, or other disposition . . . under any of the public-land laws" had been definitively interpreted at least three times by the United States Supreme Court prior to 1941 as embracing oil lands subject to disposition under either the Mining Laws or the Mineral Leasing Act of 1920.

The first such instance was the leading case of United States v. Midwest Oil Co., 236 U.S. 459 (1915), which held that the President by virtue of his inherent power as head of the Executive Branch, could withdraw lands containing oil deposits from location under the then applicable Mining

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1/ The distinction in the Executive Order between the lands closed to any disposition under the public-land laws and lands within the reserve but subject to disposition under the public-land laws is important in interpreting subsequent action by the Secretary relating to the Reserve.

2/ As of 1941, it was clear that the Mineral Leasing Act of 1920 as amended was part of the public land laws applicable to Alaska. 43 C.F.R. part 51; 43 C.F.R. §71.1, (1955 edition).

Laws enacted by Congress. 1/ In 1909, President Taft withdrew lands by Executive Order using the following language:

> ". . .all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws . . . .:

There was no issue raised in the case but that the language was effective to withdraw the lands involved from mining for oil under the then applicable Mining Laws. In sustaining the President's power to issue the order, the Court relied heavily on custom, noting among the many instances of of Executive Orders withdrawing lands from all types of entry under the public-land laws, some 44 Executive Orders regarding withdrawals for bird and wildlife purposes. (236 U.S. at 470)

The language of the withdrawal order involved in the Midwest Oil case is obviously very similar to the language used by President Roosevelt in the Executive Order withdrawal of 1941 establishing the Kenai Moose Reserve.

The second Supreme Court decision predating 1941 interpreting language used in a withdrawal order was Mason et al v. United States, 260 U.S. 545 (1923). The case was a suit by the United States to quiet title to oil lands and for an accounting for oil extracted by the defendants. Prior to defendants' development of the lands, they had been withdrawn by an Executive Order of December 15, 1908, stating that "public lands . . . are . . . withdrawn from settlement and entry, or other form of appropriation." The Court held that the validity of the order had been confirmed by the prior Midwest Oil Co. case, "where it was held that a similar order, issued in 1909, was within the power of the Executive." (260 U.S. at 553.)

1/ The Supreme Court has also affirmed the President's inherent power to withdraw lands from leasing under the Mineral Leasing Act. United States ex rel McLennan v. Wilbur, 233 U.S. 414 (1931); See also Martin Wolfe, 49 L.D. 625 (1923).

In the Mason case it was argued that the words of the order "or other form of appropriation" must be limited to the immediately preceding words of "settlement and entry" thus limiting the scope of the withdrawal to settlements under the Homestead Laws and not embracing the Mining Laws, which involved a "location and development" for oil claims. 1/ The Court rejected this argument holding that the words used "or other form of appropriation" certainly embraced the Mining Laws:

> ". . . it is insisted that the order does not apply to the cases here presented. The point sought to be made rests upon the rule of statutory construction that words may be so associated as to qualify the meaning which they would have standing apart. Here, it is said, the general words of the order, 'or other form of appropriation,' must be read in connection with the specific words 'settlement and entry,' immediately preceding; and that, so read, they must be restricted to appropriations of a similar kind with those specifically enumerated. The words 'settlement and entry,' it is said, apply only to the act of settling upon the soil and making entry at a land office; as, for example, under the Homestead Laws; that mining lands are acquired, not by settlement or entry, but by location and development; and that this process is not covered by the words 'other form of appropriation,' limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of construction, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate . . . . We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order, and consequently were prohibited by it." (260 U.S. at 553-555)

1/ Prior to 1920 oil lands were developed under the Mining Laws.

Under the holding of the Mason case, clearly the words of the 1941 Executive Order establishing the Kenai Moose Reserve withdrawing the lands from "other disposition . . . under any of the public-land laws applicable to Alaska" cannot be limited to applications for "settlement" and only make sense under the ordinary usage of the English language if applicable to other forms of use of public lands under the public-land laws.

In a third case decided just five years prior to 1941, the Supreme Court again confirmed its interpretation of the general language similar to that used in the 1941 Moose Reserve, as withdrawing lands containing oil deposits from rights granted by §20 of the Mineral Leasing Act of 1920. Bordieu v. Pacific Western Oil Co., 299 U.S. 65 (1936). The lands in question had been withdrawn by the President on December 30, 1910 "from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting use and disposal of petroleum lands". The Court held as follows:

> "The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under §20 of the leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925 . . . . The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were 'withdrawn from settlement, location, sale or entry and reserved for classification . . . .' Whether a 'classification' of the lands was effected by the order we need not determine since it is clear that they were 'withdrawn' by the definite and unambiguous words of the order; and, as shown by the bill, it is enough to exclude complainant from the privileges of the Act of 1920 that the lands were either withdrawn or classified . . . ." (299 U.S. 69-70.)

Thus, in 1941 when the President issued Executive Order No. 8979 establishing the Kenai National Moose Reserve as a wildlife refuge, the words he employed had become words of art under the existing decisions of the Supreme Court interpreting similar withdrawal orders; in every case it had been held that the language withdrew and closed the lands to development

under the applicable Mining or Mineral Leasing Laws. 1/

The subsequent action by the Department with respect to the Kenai National Moose Reserve up to the purported decision by the deputy solicitor rejecting petitioners' appeals is consistent only with the clear interpretation developed above that the Range was closed to oil and gas leasing under the Mineral Leasing Act.

In Public Land Order 487 of June 16, 1948 (13 F. R. 3462), the Secretary withdrew from "settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation" certain lands among which were the lands previously withdrawn by Executive Order 8979 of December 16, 1941 establishing the Moose Reserve. The order specifically provided that "this order shall take precedence over, but shall not modify . . . the

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1/ That the precise words used in the 1941 order precluding "other disposition . . . under any of the public-land laws applicable to Alaska" may have been even more carefully selected than required under the broad rulings and interpretations of the Supreme Court cases may be seen from the analysis of prior Interior decisions in Noel Teuscher et al, 62 I. D. 210 (1955). Teuscher referred to several such decisions which were prior to the Supreme Court's ruling in Mason et al. v United States, supra, and obviously superseded by it. In an opinion dated September 30, 1921 (48 L. D. 459) the Solicitor held that a reservation of lands of the United States" . . . from entry, location or other disposal under the laws of the United States" did not remove the reserved lands from leasing under the Mineral Leasing Act because a lease is not an "entry, location or other disposal". Similarly in Amerman v. Mackenzie, 48 L. D. 580 (1922) the Department held that a permit under the leasing act is not an "entry, or an appropriation of land with a view to the acquisition of title thereto . . ." The words used in the 1941 Executive Order creating the Kenai Moose reserve overcome both of these two limitations for they withdrew the lands not from "disposal" or "appropriation" but from "other disposition . . . under any of the public-land laws applicable to Alaska." Thus the 1941 Order is clear and unambiguous. The closing of the Moose Reserve lands to oil and gas leasing thereunder, especially as interpreted in the newly discovered substantiating documents, is completely consistent with the analysis of the Teuscher case involving an Executive Order not containing such broad language. Accord, see P & G Mining Co., 67 I. D. 217 (1960).

reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941 . . ." Public Land Order 1212 of September 9, 1955 (20 F.R. 6795) (1) revoked in its entirety Public Land Order 487 of June 16, 1948 and (2) provided that certain lands within the excepted area of the Moose Reserve (see supra, p. 5 and p. 5 note 1) should thereafter be subject to mineral leasing. It stated as follows:

> "6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws, as follows:
>
> "(a) As to the lands described in paragraph 4(a), at 10:00 a.m. on the 126th day after the date of this order." (Emphasis supplied.)

Public Land Order No. 1212 was immediately amended on October 14, 1955 (20 F.R. 7904) to eliminate the provision for leasing under the "mineral leasing laws:

> "Paragraphs No. 6 and 7 of Public Land Order No. 1212 of September 9, 1955, appearing as Doc. 55-7464 in 20 F.R. 6795 of the issue of September 15, 1955, are hereby amended by deleting therefrom the phrases 'including the mineral leasing laws', 'including applications under the mineral leasing laws', and 'including leasing under the mineral leasing laws', wherever they appear, and by adding after the words 'mining locations' in the last sentence of paragraphs 6 and 7 of the order the words 'for non-metalliferous minerals.'"

From this it is clear that the Department of the Interior did not intend to open the Moose Range, or certainly that part covered by Public Land Order No. 487, to mineral leasing applications. If, as the deputy solicitor states (note 4, page 3, Decision of September 1, 1961), Public Land Order 1212 applied only to the excepted land in the original 1941 Moose Reserve originally open to settlement, location, sale or entry, so that the amendment

of October 14, 1955 was necessary since these lands were always open to mineral leasing, it follows that no amendment would have been necessary if Public Land Order 1212 applied to Moose Range lands not within the excepted area. On such lands, as clearly revealed by paragraphs No. 6 and 7 of Public Land Order No. 1212, leasing was closed until and unless specifically opened by the Secretary.

The Interior Regulations in effect in 1955 pertaining to oil and gas leases on wildlife refuge lands at no place state that all such refuges are open to oil and gas leasing. In fact of the numerous refuges in existence throughout the United States, the Executive Orders under which they were created varied considerably in their terms as to whether oil and gas leasing is permissible. For example Executive Order 9167 of May 19, 1942 (F.R. Doc. 42-4631) establishing the Halfbreed Lake National Wildlife Refuge, Montana, and Executive Order 9166 of May 19, 1942 establishing the Lamesteer National Wildlife Refuge (7 F.R. 3767) contain no provision at all withdrawing the lands from "settlement, location, sale, or entry, or any other disposition . . . under any of the public-land laws" as contained in the Kenai National Moose Reserve Executive Order. Thus the provisions of the Interior Regulations in existence in 1955 pertaining to leases within wildlife refuge lands, setting certain conditions for the issuance of leases therein, pertain only to those refuges which by their terms are open to such leasing. (43 C.F.R. §192.9, 1955 Ed.)

The amendment of December 2, 1955 (20 F.R. 9009) to the regulation relating to the leasing for oil and gas purposes of wildlife refuge lands makes it crystal clear that the lands within the Kenai National Moose Reserve involved in the present petition were closed to oil and gas leasing. Appendix B to the amendment entitled "Fish and Wildlife Service Lands Available for Leasing Under a Satisfactory Development and Operating Plan" did not embrace the lands in the Kenai Moose Reserve involved in the present action.

Thus those lands remained closed to oil and gas leasing, in addition to the lands listed in Appendix A previously open to leasing by the terms of their withdrawal orders which were to be thereafter closed for future leasing. There was no reason to list the Kenai Moose Reserve in Appendix A because it was closed by the very terms of its establishing order.

On January 8, 1958, the regulation involving oil and gas leasing in general on wildlife refuges was extensively amended (23 F.R. 227; 43 C.F.R., 1959 Supp., 192.9). The first paragraph of the amendment made it clear that only certain of the existing refuges were open to mineral leasing by the terms of the orders establishing them:

> "§192.9 Leasing of wildlife refuge lands, game range lands and coordination lands--(a) Definitions--(1) Wildlife refuge lands. Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife purposes is vested in the United States Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing." (Emphasis supplied.)

Under the definitions established in the amendment, it was not clear whether the Kenai National Moose Reserve which was described in the 1941 Executive Order as a "refuge" and under which, by the terms of the "Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211," expressly mentioned in the 1941 Order covered all wildlife, was a "wildlife refuge land" or an "Alaska wildlife area." Assuming it to be the latter, then the effect of the January 8, 1958 amendment to the general regulation was to permit for the first time the opening of the Moose Reserve for oil and gas leasing, but only under the restrictive conditions set forth in the regulation. 1/

1/ It is clear that the January 8, 1958 general amendment to the regulations and the specific order of August 2, 1958 (dated July 24, 1958) (23 F.R. 5883) since issued by the Secretary were effective to amend the 1941 Order. Wilbur v. U.S. 46 F. 2d (1930)

The regulation expressly provided:

> "Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records." (Sec. 192.9(c).)

Section 192.9(d) of the 1958 amendment provided as follows:

> "(d) Suspension of pending applications. All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b)(3) of this section shall have been completed."

The suspensions referred to were those of August 31, 1953 and early 1956, which were not directed at the Kenai National Moose Reserve, but all wildlife reserves in the country. Hence the suspensions were legally applicable only to those reserves which by the terms of the withdrawal orders were open to oil and gas leasing. Since the Kenai National Moose Reserve by its terms was closed to any such disposition under the mineral leasing laws, the broad general suspensions of 1953 and 1956 referred to in section 192.9(d) of the 1958 amendment had no applicability to it.

That the lands within the Kenai National Moose Reserve were closed until the procedures established by the January 8, 1958 amendment could be effectuated to open certain portions of it subject to restrictive conditions, is clear from the precise order issued August 2, 1958 with respect to the Reserve by the Secretary of the Interior (23 F.R. 5883). The Order expressly provided:

> "Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:" (Emphasis supplied.)

The Order expressly provided further:

> ". . . lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8."

Petitioners filed their offers to lease in accordance with the above provision on that portion of the Moose Reserve opened as a consequence of the Secretary's regulations of January 8, 1958 and order of August 2, 1958. They have the priority accorded thereby, and their lease applications should have been granted as the first qualified applicants. McKay v. Wahlenmaier, 226 F. 2d 35, 43 (D.C. Cir. 1955); McKenna v. Seaton, 259 F. 2d 78 (D.C. Cir. 1958). 1/

The provision in the order of August 2, 1958 (23 F.R. 5883) stating that --

> "Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations."

can only apply to areas opened originally to oil and gas leasing. As seen with respect to the Kenai National Moose Reserve, this could apply only to the excepted area which the 1941 Executive Order expressly provided was subject to the "public-land laws applicable in Alaska." (See p. 5 supra, and note 1, page 5.)

Thus, it appears that the history of regulations adopted by the Secretary pertaining to the Kenai National Moose Reserve are consistent only with the construction of the withdrawal order creating the Reserve as shown in

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1/ See R. S. Prows, 66 I.D. 19 (1959)

the supporting documents that it was to be closed to all disposition under the public-land laws applicable in Alaska, thus in terms excluding oil and gas leasing. The "decision" by the deputy solicitor rejecting petitioners' appeals to the Secretary and approving the granting of oil and gas leases on lands within the Kenai National Moose Range pursuant to applications submitted in 1954 and 1955 while the Range was closed was not only erroneous, but void as lacking authority.

II. THE DEPUTY SOLICITOR LACKED AUTHORITY TO DECIDE PETITIONERS' APPEALS TO THE SECRETARY.

The purported decision by the deputy solicitor of petitioners' appeals to the Secretary of the Interior, states that it was authorized as follows:

> "Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed." (Decision, p. 7)

However, the order of delegation of authority cited by the deputy solicitor limits the delegation as follows:

> "200.2.1 General limitations.
> "A. Nothing in this Delegation Series empowers any officer or employee of the Department to exercise authority which the Secretary may not redelegate. For example the Secretary may not redelegate the authority . . .
> "B. In certain instances, the provisions of a delegation of authority to the Secretary confine redelegation to specified officers. In those cases there is a redelegation of authority in this Delegation Series only if the authority is expressly mentioned. For example . . . the authority under Executive Order 10355, to withdraw or reserve certain lands, which may be redelegated only to the Under Secretary and the Assistant Secretaries, is expressly mentioned in 210.1.1 and 1.2.
>
> "210.1.1 Under Secretary.
> "A. The Under Secretary is authorized to: . . .

"(3) Exercise the authority delegated to the Secretary by Executive Order 10355, relating to the withdrawal or reservation of certain lands by the issuance of public land orders.

"B. The Under Secretary may not redelegate the authority delegated to him by subpar. A.

"210.1.2 Assistant Secretaries.

The Assistant Secretaries, as used in the Delegation Series, include the Assistant Secretary--Mineral Resources, the Assistant Secretary--Public Land Management, the Assistant Secretary--Water and Power Development, but does not include the Assistant Secretary for Fish and Wildlife and Administrative Assistant Secretary.

"A. The Assistant Secretaries severally are authorized to: . . . (2) Exercise the authority delegated to the Secretary by Executive Order 10355, relating to the withdrawal or reservation of certain lands by the issuance of public land orders."

The Kenai Moose Range was created pursuant to the general power of the President to withdraw lands for wildlife refuges. 37 Ops. Atty. Gen. 415 (1934); 37 Ops. Atty. Gen. 502 (1934); cf. United States v. Midwest Oil Co., 236 U.S. 459 (1915). Power to revise or change the terms of Executive Order No. 8979 of December 16, 1941 (6 F.R. 6471) creating the Reserve and precluding any disposition thereof under the Mineral Leasing laws (see I, supra, pp. 2-15) was delegated to the Secretary of the Interior (and the Under Secretary or Assistant Secretaries) by the President in Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831), which provides as follows:

> "Section 1. (a) Subject to the provisions of subsections (b), (c), and (d) of this section, I hereby delegate to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." (Emphasis supplied.)

Petitioners' appeals to the Secretary of the Interior for the issuance of leases could have been rejected only if the Kenai National Moose Reserve was validly open to oil and gas leasing in 1954 and 1955 when the applications by representatives of major oil companies were filed. The purported decision by the deputy solicitor retroactively opening the Reserve by approving the issuance of these leases was unauthorized because the Secretary has not delegated his authority to modify or revoke withdrawals and reservations to a deputy solicitor. Thus petitioners' appeals can only properly be decided by the Secretary, the Under Secretary, or an Assistant Secretary, as specified in order delegating authority within the Department (24 F.R. 1348, supra). 1/ The deputy solicitor's ruling that the Reserve was open to mineral leasing prior to the Secretary's orders of January 8, 1958 and August 2, 1958, supra, was beyond his delegated authority. As a consequence there has been no valid decision on the Secretarial level of petitioners' appeals. The omission should be corrected by an exercise of supervisory authority by the Secretary.

III. THE DEPUTY SOLICITOR'S PURPORTED DECISION CONFLICTS WITH OTHER DECISIONS BY ASSISTANT SECRETARIES WITHIN THE DEPARTMENT--A CONFLICT WHICH THE SECRETARY SHOULD RESOLVE IN EXERCISE OF HIS SUPERVISORY AUTHORITY FOR THE PROPER ADMINISTRATION OF THE DEPARTMENT.

In P & G Mining Co., 67 I.D. 217 (1960) an Assistant Secretary reached

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1/ With respect to an appeal involving lands in the southern part of the Kenai Moose Reserve, the matter was decided by an Assistant Secretary. Richard K. Todd et al, A-28090, October 30, 1961. While the matter was not analyzed by Assistant Secretary Carver in that decision, many of the problems faced by the closing of the southern part of the Reserve by the August 2, 1958 order are removed if the entire Reserve, as shown by the newly discovered evidence submitted in I, supra, pp. 2-15, was intended to be closed until opened by the Secretary.

a conclusion diametrically opposite from that of the deputy solicitor in interpreting a withdrawal order establishing the Imperial National Wildlife Refuge by Executive Order 8685 dated February 14, 1941 (6 F.R. 1016). The Imperial Refuge, created the same year as the Kenai National Moose refuge, was not as explicit as the Moose order in withdrawing lands from mineral disposition. The Imperial order read as follows:

> "By virtue of the authority vested in me as President of the United States, and by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497, it is ordered that all lands owned by the United States within the following described areas, more or less, in Yuma County, Arizona, and Imperial County, California be, and they are hereby reserved and set apart, subject to valid rights, for the use of the Department of the Interior as a refuge and breeding ground for migratory birds and other wildlife . . ."

There was no language at all in the Imperial order as contained in the Kenai order which explicitly reserved the lands from any "disposition under any of the public-land laws applicable in Alaska." Nevertheless, the Assistant Secretary ruled that the Imperial order by its very terms was intended to reserve the lands from disposition under the mining laws, even though the act of June 25, 1912 as amended by the act of August 24, 1912 cited in the order expressly permitted entry of such withdrawals for the mining of metalliferous minerals:

> "In this instance, the withdrawal was made in the exercise of the President's inherent power, as evidenced by the fact that a permanent refuge was established, although the authority conferred by the statute is also cited. This seems to have been a fairly common practice for a number of years. It is significant that in some instances wherein both the President's inherent authority and the statutory authority are relied upon there is a specific provision that mining activities shall not be prohibited. This indicates clearly that a full exercise of Presidential authority was intended in every instance wherein such language was not included in the withdrawal order. Accordingly, it cannot

> be supposed that a reference to the act of June 25, 1910, in the withdrawal order was intended to effect or has effected consent or acquiescence in the continuation of mining activities in the lands included in the Imperial National Wildlife Refuge." (67 I. D. at 219-220; emphasis supplied.)

Since the Kenai Moose Reserve included no such express language permitting disposition under the mineral leasing laws, the ruling of the P & G Mining Co. case requires a conclusion that the Moose order was a full exercise of Presidential authority to withdraw the lands, and effectively withdrew the lands from the operation of the mineral leasing laws. Cf. United States v. Midwest Oil Co., 236 U.S. 459 (1915); Wilbur v. United States, 46 F. 2d 217, 220 (D.C. Cir. 1930).

Another current case directly conflicting with that of the deputy solicitor is that of Frank M. McGinley, 67 I. D. 194 (1960). In McGinley the lands sought by an applicant for an oil and gas lease had been withdrawn by a Public Land Order "from all forms of disposition, including the mineral leasing laws" (67 I. D. at 195). The case holds that the President has inherent authority to so withdraw the lands which was delegated to the Secretary of the Interior by Executive Order 10355:

> "Furthermore, the Secretary, acting under the authority delegated to him by the President in Executive Order 10355 of May 26, 1952, can withdraw public land from all forms of appropriation under the public land laws, including the mining and mineral leasing laws . . . ." (67 I. D. at 197).

Accordingly, the lands were held not available for leasing under the Mineral Leasing Act. The case is a recognition that the word "disposition" expressly used in the Kenai Moose Range order "includes" leasing under the mineral leasing laws. Again the decision conflicts with that of the deputy solicitor with respect to petitioners' appeals.

CONCLUSION

For the three reasons discussed above, or any of them, petitioners

respectfully request the Secretary to exercise his supervisory powers to decide petitioners' appeals and correct the serious administrative discrepancies revealed herein. Under the proper interpretation of President Roosevelt's Executive Order of 1941 establishing the Kenai National Moose Reserve as revealed in the newly discovered evidence submitted herewith, the Kenai Moose Reserve was closed to oil and gas leasing until expressly opened under specific conditions by the Secretary's order in 1958. The leases so issued must be cancelled and petitioners' applications filed pursuant to the specific instructions by the Secretary, approved.

Respectfully submitted,

Charles F. Wheatley, Jr.
1203 Walker Building
Washington 5, D. C.

Attorney for petitioners

IN REPLY REFER TO
LA - EO
Alaska
Kenai

ADDRESS ONLY THE
DIRECTOR, FISH AND WILDLIFE SERVICE

FILE COPY
Surname:

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
WASHINGTON

January 18, 1941.

MEMORANDUM for the Secretary.

In accordance with your instructions, there is transmitted herewith draft of a proposed proclamation to establish the Kenai National Moose Range in Alaska.

The proposed range is to be established on an area of land and water lying on the northwest portion of the Kenai Peninsula comprising approximately 2,700,000 acres. The purpose of the proposed proclamation is to reserve this area for the use of the Department of the Interior as a refuge and breeding ground for moose. This area is the natural habitat for these animals and its location affords an opportunity for effective administration.

A draft of a form of proposed proclamation has been considered by the General Land Office and returned without endorsement because the War Department has made a request for withdrawal for use as an aerial gunnery range of a tract embracing the entire northern part of the proposed moose range, which is described as follows:

> Beginning at a point known as Point Possession, in Lot No. 2, Section 17, Township 11 North, Range 6 West, S. M.; thence southwest along the South shore of Cook Inlet, a distance of approximately 40 miles, to Boulder Point; thence due South a distance of approximately 14 miles to a point approximately 2 miles North of Kenai Village; thence due East, a distance of approximately 19 miles to the Moose River; thence up the Moose River, a distance of approximately 10 miles; thence in a Northeasterly direction to the mouth of Mystery Creek; thence down the Chickaloon River to its mouth; thence Northwest along the South shore of Chickaloon Bay to the point of beginning, excluding the Nicoli Indian Village at Point Possession and the Matthison Village at the mouth of Chickaloon River, as well as the trail leading from the mouth of the Moose River to the Village of Kenai.

The area described above includes what, in my opinion, is the best part of the moose range and I would like to see it reserved for refuge purposes rather than an aerial gunnery range, and would

like to discuss with you the possibility of modifying or relocating the proposed aerial gunnery range.

The draft proclamation as now drawn differs somewhat from that as considered by the General Land Office in that the strip of land 6 miles wide along the shores of Cook Inlet and Kachemak Bay, which was omitted from the proposed refuge in the first draft, is now included because it would be impossible to administer the refuge with this undefined boundary. The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available for use and disposition pursuant to the public land laws applicable to Alaska. Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale, or other disposition under any of the public land laws applicable to Alaska and from classification and lease under the provisions of the acts of July 3, 1926 (44 Stat. 821, 48 U.S.C. Sup. 360-361) entitled "Act to provide for the lease of public lands in Alaska for fur farming and other purposes", and of March 4, 1927 (44 Stat. 1452, 48 U.S.C. Sup. 471-471o) entitled "An act to provide for the protection, development, and utilization of public lands in Alaska by establishing an adequate system of grazing livestock thereon".

It is further the intention that the proclamation will leave with you as Secretary of the Interior, the direction of the use and the regulation of the area so that the moose thereon may be conserved and at the same time properly controlled.

I recommend that if the action meets with your approval the draft of the proposed proclamation be forwarded to the President.

John N. Gabrielson
Director.

Enclosure 2300489.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

IN REPLY REFER TO:
A-28594
A-28609
A-28619

APR 25 1962

Mr. Charles F. Wheatley, Jr.
Attorney at Law
1203 Walker Building
Washington 5, D. C.

Dear Mr. Wheatley:

We have considered the petition for the exercise of supervisory authority by the Secretary of the Interior in the matter of the Departmental decision of September 1, 1961, in James K. Tallman et al. (A-28594, A-28609, and A-28619), involving certain oil and gas lease offers on lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, enclosed with your letter of February 15, 1962.

We find nothing therein which would warrant any change in the decision of September 1, 1961.

Accordingly, the petition is denied and the decision of September 1, 1961, will stand as the final decision of the Secretary in the matter.

Sincerely yours,

Edward W. Foster

DEPUTY Solicitor

Exhibit G

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(HEADING OMITTED) Civil Action No. 1852-62

Filed July 18, 1962

DEFENDANT'S MOTION TO DISMISS

The defendant moves the Court to dismiss this action because it is barred by the 90-day statute of limitations, Act of September 2, 1960, 74 Stat. 790, 30 U.S.C. §226-2, and this fact is apparent from the complaint and the exhibits attached thereto.

Respectfully,

/s/ Herbert Pittle
Herbert Pittle
Attorney, Department of Justice

Attorney for Defendant

(CERTIFICATE OF SERVICE OMITTED)

* * *

(HEADING OMITTED) Civil Action No. 1852-62

Filed August 23, 1962

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs, by their attorney, move the Court for summary judgment pursuant to Rule 53 of the Federal Rules of Civil Procedure, in accordance with the relief sought in the complaint. This motion is based on the following grounds:

1. Defendant's motion to dismiss constitutes an admission of all the material facts recited in the complaint pertaining thereto.

2. There is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law.

3. A statement of the material facts as to which there is no genuine issue is set forth in a memorandum of Points and Authorities which is annexed hereto in support of this motion for summary judgment.

For his response to defendant's motion to dismiss, the plaintiffs adopt the Memorandum of Points and Authorities submitted herewith.

Respectfully submitted,

/s/ Charles F. Wheatley, Jr.

Charles F. Wheatley, Jr.
1203 Walker Building
Washington 5, D. C.

Attorney for Plaintiffs

* * *

(HEADING OMITTED) Civil Action No. 1852-62

Filed August 23, 1962

STATEMENT UNDER RULE 9[h] TO ACCOMPANY
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

In compliance with Rule 9[h] the plaintiffs submit the following statement of material facts as to which they contend there is no genuine issue.

1. The lands involved in this case are located within the Kenai National Moose Reserve, Kenai Peninsula, Alaska, established by Executive Order

No. 8979 (6 F.R. 6471) of December 16, 1941 by President Roosevelt. The Executive Order provided that none of the lands within the Reserve, with certain exceptions,

> "... shall be subject to settlement, location, sale or entry, or other disposition ... under any of the public land laws applicable to Alaska ..."

By Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831) the President delegated to the Secretary of the Interior his power to modify the terms of outstanding withdrawals and reservations. Under Departmental Regulations (24 F.R. 1348, Departmental Manual §§200.2.1, 210.1, 210.1.2, 210.2.2A(4)(a)) the Secretary of the Interior has redelegated this power to the Under Secretary and certain Assistant Secretaries but has denied this power to the Solicitor or Deputy Solicitor of the Department.

2. On July 24, 1958 the Secretary of the Interior issued an order (published in the Federal Register of August 2, 1958, 23 F.R. 5883) relating to the Kenai National Moose Reserve which expressly provided:

> "Closed Area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:" (Emphasis supplied.)

The lands listed as "not opened" were in the southern part of the Reserve. As to lands in the northern part of the Reserve, wherein the lands involved in this case lie, the order provided:

> "... lease offers ... will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease

> offers filed in that office on that day and until 10 A. M., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8."

The Management and map were noted on the records on August 4, 1958, so that the lands involved in this case first became open to lease offers thereunder on August 14, 1958.

3. Plaintiffs duly filed their respective offers to lease on or after August 14, 1958 in accordance with the procedure specified in the Secretary's Order of July 24, 1958, supra. Their applications were the first so received. On September 4, 1958 the Bureau of Land Management issued a "Notice of Public Drawing" to "determine priorities between simultaneously filed oil and gas lease offers," which specifically included plaintiffs' applications. Subsequent to the drawing, plaintiffs remained the first lease applicants for the respective lands of those applicants filing after August 14, 1958 under the order of July 24, 1958.

4. However, the Anchorage Land Office rejected the plaintiffs' lease offers in October, 1959, on the ground that they conflicted with leases issued during the fall of 1958, based on offers filed between October 15, 1954 and January 28, 1955.

5. Plaintiffs duly appealed to the Director of the Bureau of Land Management where their appeals were denied in decisions rendered in July, 1960. Subsequently, plaintiffs duly appealed to the Secretary of the Interior. The Secretary never acted upon the appeals. Instead a deputy solicitor of the

Department in an opinion dated September 1, 1961 rejected plaintiffs' appeals on grounds not previously asserted by the Bureau of Land Management. The deputy solicitor concluded that the lands within the Kenai National Moose Reserve withdrawn by Executive Order No. 8979 of December 16, 1941 by the President were open to oil and gas leasing during 1954 and 1955 prior to the time that the Secretary of Interior had opened the lands by his order of July 24, 1958. The deputy solicitor confirmed the granting of leases within the Reserve based on the 1954 and 1955 offers, and for this reason rejected plaintiffs' offers.

6. Subsequent to the opinion by the deputy solicitor, plaintiffs duly filed a petition for exercise of supervisory authority with the defendant Secretary of the Interior pursuant to Departmental procedures for further consideration of the matter on the grounds (1) that newly discovered evidence substantiates the express language of the Executive Order that it was the intent of President Roosevelt in establishing the Kenai National Moose Reserve by Executive Order in 1941 that it be closed to oil and gas leasing under the Mineral Leasing Act; (2) that the deputy solicitor lacked authority to reject plaintiffs' appeals to the Secretary; and (3) that the deputy solicitor's purposed opinion conflicts with other decisions by Assistant Secretaries and other officers within the Department - a conflict which only the Secretary could resolve.

7. In a decision dated April 25, 1962, again signed by the same

deputy solicitor, plaintiffs' petition for exercise of supervisory authority, although considered on its merits, was denied.

8. Plaintiffs filed their present action in this court on June 8, 1962.

Respectfully submitted:

/s/ Charles F. Wheatley, Jr.

Charles F. Wheatley, Jr.
1203 Walker Building
Washington 5, D. C.

Attorney for Plaintiffs

* * *

(HEADING OMITTED) Civil Action No. 1882-62

Filed September 4, 1962

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant moves the Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the Rules of this Court, on the grounds that there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law; that the action is barred by the statute of limitations, 30 U.S.C. 226-2, and that the complaint fails to state a claim for which relief can be granted.

This motion is based upon the complaint and its attached exhibits, referred to as appendices in the complaint, and the defendant's statement and counterstatement under Rule 9(h) of material facts as to which there is no

genuine issue.

Respectfully,

/s/ Herbert Pittle
Herbert Pittle
Attorney, Department of Justice

Attorney for Defendant

* * *

(HEADING OMITTED) Civil Action No. 1852-62

Filed September 4, 1962

DEFENDANT'S STATEMENT AND COUNTERSTATEMENT UNDER RULE 9(h) OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 9(h) of the Rules of this Court, the defendant adopts as his statement of material facts the plaintiffs' statement of material facts, except those which have been controverted in defendant's response to plaintiffs' statement.

Respectfully,

/s/ Herbert Pittle
Herbert Pittle
Attorney, Department of Justice

Attorney for Defendant

* * *

(HEADING OMITTED) Civil Action No. 1852-62

Filed September 4, 1962

DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS

The defendant controverts the following assertions contained in the plaintiffs' statement under Rule 9(h) [inadvertently referred to as "Rule 9(l)"], accompanying plaintiffs' motion for summary judgment:

1. Defendant controverts the statement in the last sentence of paragraph 1 that the Secretary of the Interior " * * * has denied this power [referring to powers delegated] to the Solicitor or Deputy Solicitor of the Department."

2. Defendant controverts the statement in the last sentence of paragraph 2, to the effect that the lands involved in this case first became open to lease offers on August 14, 1958.

3. Defendant denies the statement in paragraph 3 that the plaintiffs' applications were the first applications received for the lands involved in this case.

4. Defendant controverts the assertion in paragraph 5 that the Secretary of the Interior never acted upon the appeals filed by the plaintiffs.

5. Defendant controverts the statement in paragraph 6 that the plaintiffs "duly" filed a petition for exercise of supervisory authority with the defendant, pursuant to departmental procedure.

All of the assertions in the plaintiffs' statement under Rule 9(h) which are controverted by the defendant, as set forth above, constitute plaintiffs'

conclusions and argument and are not statements of fact.

Respectfully,

/s/ Herbert Pittle
Herbert Pittle
Attorney, Department of Justice

Attorney for Defendant

* * *

(HEADING OMITTED) Civil Action No. 1852-62

Filed October 16, 1962

M E M O R A N D U M

This matter having come before the Court on the 9th day of October, 1962 on the motions for Summary Judgment of Plaintiffs and Defendant, respectively, in the above entitled matter, the Points and Authorities submitted therewith, the respective statements of opposition filed thereto and the arguments advanced on hearing, and the Court having fully considered same and being fully advised in the premises, the Court concludes, there being no genuine issue of material fact, that the motion for summary judgment raised by the Defendant Udall should be and is, hereby granted and accordingly, the motions of the Plaintiffs Tallman, et al. for summary judgment should be, and are, hereby denied, except that part of the Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations should not

form part of the basis for the granting of Defendant Udall's motion for summary judgment and, accordingly, Defendant Udall's motion to dismiss is denied.

Counsel for the Defendant Udall will prepare and submit an appropriate order in conformity with the Court's ruling.

(signed) Charles F. McLaughlin
Judge

October 16, 1962

* * *

(HEADING OMITTED) Civil Action No. 1852-62

Filed November 1, 1962

JUDGMENT

This case having come on for hearing on plaintiffs' motion for summary judgment and on defendant's motions to dismiss and for summary judgment, and the Court having heard argument of counsel and considered the material in support of the motions, and it appearing that there is no genuine issue of fact and that the defendant is entitled to judgment as a matter of law,

WHEREFORE, IT IS ORDERED as follows:

1. Defendant's motion for summary judgment is granted.

2. Defendant's motion to dismiss is denied.

3. Plaintiffs' motion for summary judgment is denied.

4. Judgment is hereby entered against the plaintiffs and in favor of the defendant and the complaint is dismissed.

Dated, this 1st day of November, 1962.

(signed) Charles F. McLaughlin
Judge
United States District Court

* * *

(HEADING OMITTED) Civil Action No. 1852-62

Filed December 31, 1962

NOTICE OF APPEAL

Notice is hereby given this 31st day of December, 1962, that James K. Tallman, Alice P. Tallman, Christine Fleischer, William O. Rabourn, Harry B. Cockrum, Bailey E. Bell, James G. Carlson, Michael F. Beirne, James E. O'Malley and Waldo E. Coyle, plaintiffs, hereby appeal to the United States Court of Appeals for the District of Columbia from that part of the judgment of this Court granting defendant's motion for summary judgment and denying plaintiffs motion for summary judgment entered on the 1st day of November, 1962 in favor of defendant, Stewart L. Udall aginst said plaintiffs.

/s/ Charles F. Wheatley, Jr.
Charles F. Wheatley, Jr.
1203 Walker Building
Washington 5, D. C.
Attorney for plaintiffs

* * *

BRIEF FOR APPELLANTS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ALICE P. TALLMAN,
CHRISTINE FLEISCHER, WILLIAM O. RABOURN,
HARRY B. COCKRUM, BAILEY E. BELL,
JAMES G. CARLSON, MICHAEL F. BEIRNE,
JAMES E. O'MALLEY and WALDO E. COYLE,

Appellants,

v.

STEWART L. UDALL, SECRETARY
OF THE INTERIOR,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Charles F. Wheatley, Jr.
Robert L. McCarty
McCarty and Wheatley
1203 Walker Building
Washington 5, D. C.

Attorneys for Appellants

QUESTIONS PRESENTED

Appellants applied for oil and gas leases under section 17 of the Mineral Leasing Act on certain tracts of lands located within the Kenai National Moose Range, Alaska, pursuant to an express order of the Secretary of Interior of August 2, 1958 opening part of the lands within that Range to leasing. The procedures provided in the order required "all offers" to be considered as having been filed simultaneously with priority to be determined by a drawing. The appellants filed in August 1958 pursuant to the terms of the order; were winners at the drawing held in 1959; but their applications were rejected on the ground that the Department had previously issued leases for the lands in the fall of 1958 to others who had filed offers in 1954 and 1955. The questions presented here are:

1. Whether the lands within the Moose Range, established by President Roosevelt by Executive Order in 1941, were closed to all oil and gas lease offers until validly opened by the order of August 2, 1958, so that the 1954 and 1955 offers were void.

2. Whether, even if the Moose Range was open to oil and gas lease offers prior to August 2, 1958, the Secretary has failed to comply with his own order setting up the specific procedures for determining priority of all offers when finally opening the Range to oil and gas leasing, thereby denying appellants' entitlement to leases as the first qualified applicants.

3. Whether the issuance of leases by the Department within the Range to others than the applicants at rentals of 25 cents an acre was null and void as contrary to Public Law 85-505 of July 3, 1958 requiring payment of 50 cents an acre.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ALICE P. TALLMAN
CHRISTINE FLEISCHER, WILLIAM O. RABOURN,
HARRY B. COCKRUM, BAILEY E. BELL,
JAMES G. CARLSON, MICHAEL F. BEIRNE,
JAMES E. O'MALLEY and WALDO E. COYLE,

APPELLANTS

v.

STEWART L. UDALL, SECRETARY
OF THE INTERIOR,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

OPINION BELOW

The district court did not write an opinion. A memorandum preceding entry of judgment was filed by the court on October 16, 1962, (J.A. 73).

JURISDICTION

In this case, jurisdiction of the district court was invoked under Title 11, Section 306, of the District of Columbia Code; Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. sec. 1009; the Declaratory Judgment Act, 28 U.S.C. secs. 2201 and 2202; and under the inherent power of the court to grant injunctive relief. The pleadings establishing jurisdiction are at J. A. 1-2; Complaint, pars. 1-4. On November 1, 1962, Judge McLaughlin granted the appellee's motion for summary judgment, but denied appellee's motion to dismiss, and denied appellants' motion for summary judgment, and entered judgment against the appellants in favor of the appellee (J.A. 74). On December 31, 1962 appellants filed a notice of appeal from that part of the judgment granting appellee's motion for summary judgment and denying appellants' motion for summary judgment. (J.A. 75). The jurisdiction of this Court over the appeal rests on 28 U.S.C. sec. 1291.

STATEMENT

Nature of proceeding in brief. This suit arose as a result of the Department of the Interior's rejection of appellants' offers to lease oil

and gas lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., sec. 226). Section 17 of the Mineral Leasing Act requires the Secretary to issue such leases to the "first qualified applicant." The Kenai National Moose Range was created by Executive Order of President Roosevelt in 1941. That order expressly provides that none of the bulk of the lands therein "shall be subject to settlement, location, sale or entry, or other disposition ... under any of the public land laws applicable to Alaska."

The power to open such reservations was granted by President Eisenhower to the Secretary of the Interior in 1952 (Executive Order No. 10355 of May 26, 1952; 17 F.R. 4831). [1/] Secretary of Interior Seaton in an order published in the Federal Register August 2, 1958 (23 F.R. 5883; Appendix I hereto) declared the lands in the Kenai National Moose Range, including the lands involved herein, open to lease offers under the Mineral Leasing Act, one of the public land laws applicable to Alaska. This order stated that lease offers "will not be accepted for filing until the tenth day after the agreement [between the Bureau of Land Management and the United States Fish and Wildlife Service] and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska." The Secretary's order provided further that all offers filed within the ten day period thereafter

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1/ Previous Secretaries had possessed somewhat similar powers under earlier Executive Orders. See Executive Order No. 9337 of April 24, 1943 (8 F.R. 5576).

were to be treated as simultaneously filed with priority to be determined by a drawing. Appellants' offers were filed after August 14, 1958 when offers were first permitted pursuant to the terms of the order; thereafter the appellants' names were drawn as the first applicants under the procedures established by the Secretary's regulations. In spite of this, the Department rejected appellants' offers and granted leases for the lands in the fall of 1958 to representatives of certain major oil companies who had filed lease offers for the lands in 1954 and 1955. These offers had been filed while a general Bureau of Land Management order of August 31, 1953 suspended all applications under the Mineral Leasing laws on all open wildlife lands in the country. The leases were granted at 25 cents per acre rentals rather than the 50 cents per acre specified by Public Law 85-505 enacted July 3, 1958 and the order of August 2, 1958.

The Department, while admitting that all of the lands within the Kenai National Moose Range were closed to oil and gas leasing since August 31, 1953 up to the Secretary's order of August 2, 1958 during which time the offers in 1954 and 1955 were filed, contends that its action was proper on the ground that all the lands within the Range were at all times open to the filing of offers to lease for oil and gas. (J.A. 34, Exhibit E to Complaint).

In the following detailed statement of facts, the appellants will attempt to trace, in chronological order, the creation of the Kenai National Moose

Range in 1941 and every administrative action by the Department relating thereto up to the order of August 2, 1958, after which leases within the Range were first issued, to provide the factual background for the legal conclusions reached in this brief (1) that the particular lands of the Moose Range involved in this case were closed to all oil and gas leasing activity, offers as well as leases, prior to the 1958 order; (2) that the Secretary has failed to comply with his own 1958 order and regulations in rejecting appellants as the first qualified applicants for the lands in question; (3) that even if not closed by the order creating the Moose Range in 1941, the general suspension order of August 31, 1953 precluded oil lease applications thereafter thus barring the 1954 and 1955 lease offers; and (4) the issuance of the leases at the 25 cent rentals rather than 50 cents was contrary to Public Law 85-505 of July 3, 1958.

Chronological statement of facts.

The order of 1941. The Kenai National Moose Range was created by Executive Order No. 8979 of December 16, 1941 (6 F.R. 6471) a copy of which is set forth in Appendix A. The order provides in part as follows:

> "By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and Alaska Game Commission as a refuge and breeding ground for moose ...." (Emphasis supplied.)

After describing all of the lands within the Range, the order continued:

> "None of the above-described lands excepting Tps 5N., Rs. 8, 9, 10, and 11W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, ... Provided, however, That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: ..." (Emphasis supplied.)

The distinction in the Executive Order between the bulk of the lands closed to any disposition under the public-land laws, and the few excepted lands within the Range which were open to disposition under the public-land laws, is important in interpreting subsequent action by the Secretary relating to the Range. All of the offers to lease made in 1958 by the appellants, except the offer of appellant Coyle, related to lands in the area thus closed to disposition by the Executive Order of 1941.

The Director of the Fish and Wildlife Service in a Memorandum to the Secretary dated January 18, 1941, just prior to the establishment of the Range, stated its purpose as follows:

> "The proposed range is to be established on an area of land and water lying on the northwest portion of the Kenai Peninsula comprising approximately 2,700,000 acres. The purpose of the proposed proclamation is to reserve this area for the use of the Department of the Interior as a refuge and breeding ground for moose. This area is the natural habitat for these animals and its location affords an opportunity for effective administration."

* * * *

"The draft proclamation as now drawn differs somewhat from that as considered by the General Land Office in that the strip of land 6 miles wide along the shores of Cook Inlet and Kachemak Bay, which was omitted from the proposed refuge in the first draft, is now included because it would be impossible to administer the refuge with this undefined boundary. The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available for use and disposition pursuant to the public land laws applicable to Alaska. Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale or other disposition under any of the public land laws applicable to Alaska." (J.A. 62; Ex. F to Complaint; emphasis supplied.)

The order of 1948. In Public Land Order 487 of June 16, 1948 (13 F.R. 3462, copy annexed as Appendix B), the Secretary withdrew those lands within the Kenai National Moose Range which the 1941 order left open for disposition under the Alaska public land laws (as well as other lands). The order stated in part:

"Subject to valid existing rights, the public lands within the following-described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation."

* * * *

"This order shall take precedence over, but shall not modify, ... the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941 ...."

With the promulgation of Public Land Order 487, all of the lands within the Kenai Moose Range were thus covered by the same prohibition against disposition under any of the public land laws applicable in Alaska.

The order of 1953. In 1953 the Department of the Interior undertook a study to determine whether oil and gas leasing in wildlife refuges owned by the United States was consistent with the protection of wildlife and whether regulations governing leasing in some refuges should be changed. In contrast to the 1941 order establishing the Kenai Moose Range, many wildlife areas have been established under orders containing no prohibition against otherwise applicable public land laws, such as the Mineral Leasing Act. To implement the study, on August 31, 1953, the Department ordered the suspension of activity in connection with oil and gas leasing "within wildlife refuges," in the following terms:

> "... Pending the completion of this study and the possible revision of existing regulations, you will suspend action on all pending oil and gas lease offers and applications for lands within such refuges ...." (see Appendix C attached; emphasis supplied.)

Despite both (1) the express language of the Executive Order creating the Kenai National Moose Range (extended by Public Land Order 487 to all of the land within the Range) which closed the bulk of the lands to any form of entry, and (2) the suspension order of August 31, 1953 closing any open wildlife areas to applications for oil and gas leases, the applicants to whom the Department granted leases in the present case filed oil and gas lease offers for the lands within the Kenai Moose Range between October 15, 1954 and January 28, 1955 (J.A. 33; Exhibit E to Complaint, p. 1). All of the offers except one were for lands closed by the terms of the 1941 order creating the Range; this one, covering the lands sought by appellant Coyle,

was in the excepted area originally left open by the 1941 Executive Order but closed by Public Land Order 487 of 1948, supra, p. 6.

The order of 1955 and its amendment. Subsequently, in Public Land Order 1212 of September 9, 1955 (20 F.R. 6795; copy annexed as Appendix D), the Secretary revoked in its entirety Public Land Order No. 487 of June 16, 1948, supra, which had withdrawn that portion of the Kenai National Moose Range originally left open when the Range was created in 1941. Public Land Order 1212 first made a specific provision with respect to one small tract of land in the Range:

> "2. Subject to valid existing rights, the following-described lands are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral leasing laws, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes: ..." (Emphasis supplied)

The area so described was a small tract of 568.68 acres not involved in the present case in any way. As to the remainder of the lands restored, Public Land Order 1212 gave a first preference to homesteading and then provided:

> "6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws, as follows:
>
> (a) As to the lands described in paragraph 4(a), at 10:00 a.m. on the 126th day after the date of this order ....
>
> * * * *
>
> "All applications filed either at or before 10:00 a.m. of such 126th, 154th or 182nd day, including applications under the mineral leasing laws, shall be treated as though simultaneously filed at the hour specified on each day ....

> "7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, including leasing under the mineral leasing laws, in accordance with appropriate laws and regulations." (Emphasis supplied.)

Public Land Order No. 1212 was amended about six weeks after its issuance (October 14, 1955; 20 F.R. 7904; Appendix E, annexed hereto) to eliminate the provision for leasing under the "mineral leasing laws":

> "Paragraphs No. 6 and 7 of Public Land Order No. 1212 of September 9, 1955, appearing as Doc. 55-7464 in 20 F.R. 6795 of the issue of September 15, 1955, are hereby amended by deleting therefrom the phrases 'including the mineral leasing laws', 'including applications under the mineral leasing laws' and 'including leasing under the mineral leasing laws', wherever they appear, and by adding after the words 'mining locations' in the last sentence of paragraphs 6 and 7 of the order the words 'for non-metalliferous minerals.' "

The purpose of the amendment was apparently to prevent possible confusion with earlier orders. This appears from the fact that the amendment did not change the reference to mineral leasing in paragraph 2, supra, showing that when lands were closed to "appropriation under the public land laws" this necessarily included the mineral leasing laws, unless the order expressly excepted mineral leasing, as paragraph 2 did. Since the language of Public Land Order No. 1212 was by itself clear that the lands covered thereby were to be thereafter open to leasing under the Mineral Leasing Laws without the phrase "including the mineral leasing laws," the inclusion of this and similar phrases in paragraphs 6 and 7 was unnecessary surplusage. The amending action conformed Public Land Order

No. 1212 of 1955 with the 1948 order, which it revoked, and with the 1941 order establishing the Range. Thus, after Public Land Order 1212 was amended (affecting only the lands originally left open within the Range which were closed by Public Land Order 487 supra), the status of the lands within the Kenai National Moose Range returned to that of the original order, i. e. the bulk of the lands were closed to disposition under any of the public land laws, and the excepted remainder were open to disposition under such laws. 2/

The regulations and order of 1958. The order of the Secretary which permitted the appellants to make the applications which form the subject matter of this appeal was published on August 2, 1958. This order, which opened the great bulk of the lands of Kenai Range to oil and gas leasing, was

---

2/ No lease offers filed on the open portion of the Kenai Range shortly after the October 1955 action in Public Land Order 1212 involve lands selected by parties in the present case (the Coyle lands were not filed during this period) but further actions of the Secretary on wildlife matters affecting these lands are highly germane to the basic question of whether the disputed leases were properly issued. Among these actions are: 1. Amended regulations covering those wildlife areas subject to leasing were published on December 8, 1955 (20 F.R. 9009; copy annexed as Appendix F). The delineation of certain areas of the Kenai Peninsula in "Appendix B" of these amended regulations covers the lands reopened to leasing by the October 1955 order of the Secretary, but does not cover the lands involved in this case. 2. A suspension of leasing activity in wildlife refuges was again imposed early in 1956 (see Appendix G herein). Any lease offers on open lands in the Kenai Range were automatically affected by this order. While, again, such offers did not affect lands involved in this case, action by the Secretary in 1958 concerning the Kenai Range, referring to "suspension of pending applications," could be meaningful only in terms of this 1956 suspension affecting the lands in the excepted part of the Moose Range reopened to mineral leasing by Public Land Order 1212.

predicated on the thoroughgoing amendment issued on January 8, 1958 of the general regulations regarding leasing in wildlife areas. (23 F.R. 227; copy annexed as Appendix H).

This January 1958 amendment sought to undertake a comprehensive reevaluation of all of the wildlife lands owned by the United States, regardless of whether they had been previously closed or open to oil and gas leasing. It made four general classifications of these wildlife lands: (1) Wildlife refuge lands; (2) Game range lands; (3) Coordination lands; and (4) Alaska wildlife areas. While the lands within the Kenai National Moose Range would otherwise qualify under the coverage in the regulation for "(1) Wildlife refuge lands," 3/ since they are located in Alaska they fall into the special category of "(4) Alaska wildlife areas" defined in the regulation as follows:

3/ The regulation provided that all lands defined as (1) "Wildlife refuge lands" were to be closed to oil and gas leasing or lease offers--

> "... even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing." (§192.9(a)(1); §192.9(b)(1); emphasis supplied.)

The language closing these lands, which included those "wildlife refuge lands" originally closed by the orders creating them, as well as those originally open, was quite clear:

> "(1) No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in subparagraph (2) of this paragraph." (§192.9(b)(1); Appendix H.)

Subparagraph (2) deals only with the limited instance of leases to prevent drainage of oil deposits from under these lands.

> "(4) Alaska wildlife areas. Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service."

"Alaska wildlife areas" are treated all the same under the regulation, regardless of whether previously open or closed to oil and gas lease offers, with such lands to be available for leasing if, and only if, specific agreements could be worked out between the Bureau of Land Management and the Fish and Wildlife Service to protect the wildlife:

> "(3) As to ... Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior. ...
>
> "(4) The remaining lands in paragraph (a) ... (4) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the Fish and Wildlife Service and the Bureau of Land Management ...."

The regulation, after setting forth procedures for the publication and filing of the agreements in the Federal Register, included the following general procedural provision:

> "(d) Suspension of pending applications. All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b) (3) of this section shall have been completed." (§192.9(d).)

This referred to the earlier general suspension orders, which as discussed above, were applicable only to those offers made in that excepted portion of

the Kenai National Moose Reserve open to such offers (see supra, pp. 7, 10, fn. 2).

Within a few weeks after the completely new regulations regarding wildlife lands were promulgated, Secretary of Interior Seaton classified the Kenai National Moose Range for oil and gas leasing. In a press release issued January 29, 1958, the Secretary stated:

> "I have approved this week a classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development ....
>
> * * * *
>
> "I am assured by Assistant Secretary Leffler that this action opening a portion of the Kenai range subject to the proposed regulated development is entirely consistent with the primary purpose for which the range is managed." (J.A. ; Exhibit B to Complaint; emphasis supplied.)

With this background, on August 2, 1958, Secretary Seaton's order issued on July 24, 1958 relating to the Kenai National Moose Range, Alaska, was published in the Federal Register (23 F.R. 5883; copy annexed hereto as Appendix I). The order referred to an agreement that had been consumated between the Bureau of Land Management and the United States Fish and Wildlife Service of the Department and then stated:

> "Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing: ..." (Emphasis supplied.)

The lands described as "not opened" involved lands in the southern part of the Range and did not embrace any of the lands involved in this case which lay in the northern part of the Range. With respect to these northern lands

which were opened to oil and gas leasing and lease offers, the Secretary's order provided as follows:

> "The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (41 Stat. 437) and the regulations in 43 CFR, Part 192 and the provisions hereof. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.
>
> All offers to lease must be submitted on Form 4-1158 and in accordance with the regulation 43 CFR 192.42, accompanied by a $10 filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85-505 enacted July 3, 1958.
>
> In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8." (Appendix I.)

The reference to "Offers to lease covering any of these lands which have been pending and upon which action was suspended" could only refer to those lease offers made after Public Land Order 1212 of September 9, 1955 as amended (Appendix D and E), supra, pp. 8-9, which reopened the excepted land and six mile strip within the Range which originally was open when the Range was created in 1941.

Appellants duly filed their respective offers to lease on or after August 14, 1958 in accordance with the procedure specified in the Secretary's order of

August 2, 1958, supra. Their applications were the first so received. (J.A. 38, Opinion of Deputy Solicitor, Exhibit E to Complaint, p. 6 .)

Sometime after appellants' applications were filed, but without notice to appellants, the Department issued leases for the lands in question to the representatives of the major oil companies, based on the offers filed by them between October 15, 1954 and January 28, 1955. About a year later, on September 4, 1959, the Bureau of Land Management issued a "Notice of Public Drawing" to "determine priorities between simultaneously filed oil and gas lease offers," which specifically included appellants' applications (J.A.18 ; Exhibit C to Complaint). The notice specifically stated:

> "Numerous oil and gas lease offers 1/ were filed during the simultaneous period established in accordance with the agreement classifying the lands in the Kenai National Moose Range, Alaska, for oil and gas leasing purposes, pursuant to the regulations, 43 CFR 192.9 (Circular 1990), approved by the Secretary on January 8, 1958.
>
> "43 CFR 192.9(b)(3) and (c) state in pertinent part as follows:
>
> " 'Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.'
>
> "The records were noted August 4, 1958, therefore, all offers filed for these lands on or after 10:00 A.M., August 14, 1958 and until and including 10:00 A.M. on the tenth day thereafter, which in this instance must be Monday, August 25, 1958, as the land was not open Sunday, August 24, 1958, are considered as simultaneously filed.
>
> "A public drawing is required to determine priorities between simultaneously filed oil and gas lease offers, therefore, such a drawing will be held involving the oil and gas offers in

question 1/ at the Anchorage Land Office, 334 E. Fifth Avenue, Anchorage, Alaska, in accordance with the governing regulations, 43 CFR 295.8(c), at 2:00 P. M., September 14, 1959."

* * * *

"1/ The names & addresses of the offerors and serial numbers of their respective oil & gas lease offers appear in Appendix 'A', attached hereto." (Emphasis supplied).

"Appendix 'A'" of the Notice of Public Drawing included the name of each of the appellants in this case, but none of the names of those to whom the Department had previously issued oil and gas leases for the lands in question. In fact, the parties to whom the leases were issued did not file lease offers as specified in the Secretary's order of August 2, 1958. Subsequent to the drawing, of those applicants who had filed after August 14, 1958 under the terms of the order of August 2, 1958, the appellants in this case remained the first lease applicants for the lands in question.

In October 1959, after the drawing, the Anchorage Land Office of the Department formally rejected appellants' lease offers on the ground that they conflicted with the leases issued the previous fall (J.A.25, 27, 30; see Exhibit D to Complaint). This was the first notice to appellants that the lands on which they had filed pursuant to the regulations, and on which a drawing had been held also pursuant to Departmental action, had in fact already been leased by the Secretary.

Appellants duly appealed to the Director of the Bureau of Land Management where their appeals were denied in decisions rendered in July, 1960 (J.A. 25, 27, 30; see Exhibit D to Complaint). Appellants thereafter duly appealed to the Secretary

of the Interior. An opinion by a Deputy Solicitor of the Department dated September 1, 1961 rejected appellants' appeals and confirmed the granting of the leases within the Range based on the 1954 and 1955 offers (J.A. 32, Exhibit E to Complaint). A petition for rehearing was denied by the Department on April 25, 1962 (J.A. 6[illegible]; Exhibit G to Complaint).

On June 5, 1962, appellants filed suit in the court below against the Secretary. Both sides moved for summary judment after filing statements of fact as to which there was no genuine issue (J.A. 66, 71-72; Statements under Rule 9(h)). Arguments on the cross-motions for summary judgment were heard. On November 1, 1962, the court below granted the appellee's motion for summary judgment and denied appellants' motion for summary judgment. Appellants duly appealed to this Court on December 31, 1962.

STATUTES INVOLVED

Section 17 of the Mineral Leasing Act as amended by the Act of August 8, 1946, section 3, 60 Stat. 951, 30 U.S.C. §226, authorizing the Secretary of the Interior to issue oil and gas leases on public lands of the United States open to leasing reads as follows:

> "... When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding...."

The Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141, provides as follows:

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

SUMMARY OF ARGUMENT

I

The President, acting under authority expressly conferred upon him by the Pickett Act of 1910, may withdraw lands from leasing under the Mineral Leasing Act of 1920. When lands are so withdrawn, any lease offers thereupon are void and are not validated should the lands later become subject to leasing.

When President Roosevelt created the Kenai National Moose Range in 1941, he expressly provided in broad language that except for a small excepted area, the bulk of the lands therein were not to be "subject to settlement, location, sale, or entry or other disposition under any of the public land laws applicable to Alaska." This, of necessity, included the Mineral Leasing Act, which was in 1941,and still is, one of the public land laws applicable to Alaska. The Secretary's regulations so provide.

Not only does the administrative history of this 1941 Executive Order support this clear meaning, but the words used in the order had been judicially construed prior to 1941 as applicable to withdrawn lands under the Mineral Leasing Act of 1920. This Court in Wilbur v. United States ex rel Barton,

affirmed by the Supreme Court in United States ex rel. McLennan v. Wilbur, construed the words of the 1910 Pickett Act as embracing all leasing activity under the Mineral Leasing Act. This case, decided in 1931, was controlling law in 1941, as well as today, on the meaning of the words used in the Pickett Act. The Pickett Act was passed for the express purpose of confirming Executive power to withdraw oil and gas lands. When President Roosevelt employed similar words in establishing the 1941 Moose Reserve, it appears inescapable that they were intended to have their judicially construed, as well as plain meaning, to withdraw the lands from leasing under the Mineral Leasing Act. Three other decisions by the Supreme Court, United States v. Midwest Oil Co., Mason v. United States, and Bordieu v. Pacific Western Oil Co., construing similar language in withdrawals as effective to reserve oil and gas lands, all prior to 1941, also support this conclusion.

II

Even if the Executive Order of 1941 establishing the Kenai National Moose Range did not close the Range to oil and gas leasing, the Secretary, having decided in his order of August 2, 1958 to issue noncompetitive leases within the northern portion of the Range, was under a mandatory duty imposed by section 17 of the Mineral Leasing Act to issue such lease to "the person first making application for the lease who is qualified to hold a lease ..." The Secretary in his order of August 2,

1958 set up an express procedure for the treatment of all oil and gas lease offers for lands within the Range to determine this question, providing that "the priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8." The 1954 and 1955 offers were not entitled to any special treatment because they were not "pending offers" upon which action was suspended because they were filed after the August 31, 1953 suspension order. The procedure outlined in 43 CFR 295.8 provides for a drawing to determine the order of priority of applicants. Appellants complied with all of the procedures set forth by the Secretary in his order of August 2, 1958, as well as the applicable regulations, and after the drawing in September 1959 were the first applicants for the lands.

The action of the Department in issuing leases about a year prior to the drawing was in complete disregard of all the regulations established for determining priority among conflicting applicants. This case is the exact converse of Thor-Westcliffe Development, Inc. v. Udall (No. 17,101, January 24, 1963) just decided by this Court. There the Secretary was sustained in his plea that his regulations setting up similar procedures for a drawing to determine a fair method for determining priority among applicants were valid. That case held that an applicant who shunned the drawing procedure was not entitled to a lease. In the present case, the appellee seeks to completely disregard the drawing procedures he established for the determination of priority among lease applicants for lands to be leased in the Range, to sustain his

grant of a secret preference lease to those who shunned the very procedures he sought to sustain in Thor-Westcliffe. Under the principles established in the Thor-Westcliffe case, as well as McKay v. Wahlenmaier, his action must be rejected as arbitrary.

III

Not only did the Secretary violate his regulations by granting preference leases to other applicants, but in granting such leases he violated Public Law 85-505 enacted July 3, 1958 providing for payment of 50 cents per acre for rentals, rather than the 25 cents under which these leases were issued. The exception in Public Law 85-505 for offers pending on May 3, 1958 was clearly not applicable if, as the Secretary contends, these offers were suspended, because the act and its legislative history are clear that it was intended to apply only to those areas open to leasing where offers had accumulated, not to suspended areas or areas such as the Kenai Moose Range which, even the Secretary admits, was closed to all oil and gas lease offers subsequent to the regulations of January 8, 1958. Since the exception is inapplicable the Secretary had no power to issue the leases at the 25 cent figure and the leases were void under controlling precedents.

ARGUMENT

1. THE KENAI MOOSE RANGE ESTABLISHED BY EXECUTIVE ORDER IN 1941 WAS CLOSED TO OIL AND GAS LEASE OFFERS (EXCEPT FOR THAT PORTION INVOLVED IN APPELLANT COYLE'S OFFER) UNTIL OPENED THERETO BY THE SECRETARY IN 1958 AFTER WHICH APPELLANTS (INCLUDING COYLE) WERE THE FIRST QUALIFIED LEASE APPLICANTS.

The law is clear that the President may withdraw or reserve public lands from leasing under the Mineral Leasing Act of 1920 as amended (41 Stat. 437; 30 U.S.C. 181, et seq.) Wilbur v. United States ex rel. Barton, 60 App. D.C. 11, 46 F. 2d 217 (D.C. Cir. 1930), affirmed United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931). Once lands are withdrawn and closed to leasing under the Mineral Leasing Act, applications to lease such lands are void and are not validated should the land later become available for leasing. D. Miller, 60 I.D. 161 (1948); Mary E. Brown, 62 I.D. 107 (1955). Acccrdingly, if the Kenai National Moose Range was closed to oil and gas leasing at the time the conflicting offers of 1954 and 1955 were filed, appellants are entitled to a decree by this court declaring them the rightful lessees to the lands involved.

The Department argues that the Kenai Range was never closed to oil and gas leasing "because nothing in the withdrawal contained in the executive order [creating the Reserve] specifically excluded those lands from the scope of the

[Mineral Leasing] act." (J.A. 34; Exhibit E to Complaint.) To the contrary, the clear language, administrative history and judicial construction of the language used in Executive Order No. 8979 of December 16, 1941 establishing the Kenai National Moose Range in Alaska, make it clear that the Range was to be closed to all forms of disposition under the public land laws, necessarily including the mineral leasing laws.

The 1941 order provided that:

> "None of the above-described lands ... shall be subject to settlement, location, sale, or entry, or other disposition (except for fish traps) under any of the public-land laws applicable to Alaska ..." (Executive Order No. 8979, 6 F.R. 6471; Appendix A hereto)

It is difficult to imagine broader language than that used restricting the lands against any "settlement, location, sale, or entry or other disposition under any of the public-land laws applicable to Alaska." In 1941, as well as today, there was no doubt that the Mineral Leasing Act of 1920 as amended was part of the public land laws applicable to Alaska. The Secretary's regulations expressly so provide:

> "Part 51--Public Land Laws Applicable to Alaska
>
> "... in section 3 of the act of August 24, 1912 (37 Stat. 512; 48 U.S.C. 23), it was provided that 'the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.
>
> "(c) In an opinion dated June 29, 1915 (30 Op. Atty. Gen. 387), the Attorney General had occasion to consider the effect of the act of August 24, 1912, in respect to extending certain

public-land statutes to Alaska, and, in this connection, he stated: 'The express exception of the public land laws, found in the earlier organic acts, is here omitted; all the laws of the United States are to operate in Alaska save only such as may be locally inapplicable.'" (43 CFR §51.)

* * * *

"§71.1 Mineral leasing laws and regulations applicable in Alaska. Subject to the provisions of §§ 71.2 and 71.3, the regulations under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. 181, et seq.), as amended and supplemented, ... shall govern the issuance of oil and gas ... leases ... in Alaska." (43 CFR §71.1, 1954 Ed.)

Similarly, the administrative history of the creation of the Moose Range in 1941 makes it perfectly clear that the withdrawn lands were not to be open for acquisition or disposition under any of the public land laws, including the mineral leasing laws. In a memorandum for the Secretary dated January 18, 1941, Mr. Gabrielson, Director of the Fish and Wildlife Service, explained the purpose of the withdrawal for the Kenai National Moose Range was to reserve the area for the use of the Department of the Interior as a refuge and breeding ground for moose, stating that:

"...[Other than the excepted area] it is the intention that the remainder of the refuge area be reserved from settlement, location, sale, or other disposition under any of the public land laws applicable to Alaska. ..." (J.A. 62, Ex. F to Complaint.)

The power of the President to issue the Executive Order establishing the Kenai National Moose Reserve, was derived from the Pickett Act of June 25, 1910, 36 Stat. 847 (43 U.S.C.A. §141) which provides as follows:

"The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands or other public purposes to be specified in the orders of withdrawals, and such

> withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." (Emphasis supplied.)

Obviously the language of the Moose Reserve Executive Order is a paraphrase of that contained in the Pickett Act. This Court, in an opinion confirmed by the United States Supreme Court, held this language embraces and includes the withdrawal of oil and gas lands from leasing or other disposition under the Mineral Leasing Act of 1920. In Wilbur v. United States ex rel. Barton, 60 App. D.C. 217, 46 F. 2d 217, 220-221 (1930), affirmed United States ex rel. McLennan v. Wilbur, 283 U.S. 414 (1931), this Court rejected a contention that the language of 1910 Pickett Act did not include the closing of lands to oil and gas leasing as follows:

> "... But it is insisted that the act of 1910 only authorizes the temporary withdrawal by the President of public lands 'from settlement, location, sale, or entry,' and that the application for permit and the lease which may follow discovery of oil under the act of 1920 are not embraced within those terms. It is apparent, we think, that the act of 1910 was intended to be of wide scope and recognized the authority of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.
>
> * * * *
>
> Under the act of 1920, the applicant for a permit was required to locate and designate the lands sought in his application. The issuance of a permit and the discovery of 'valuable deposits of oil or gas' entitled him to a lease -- an interest in the land. This, we think, was akin to location or entry, as used in the act of 1910." (Emphasis added.)

The United States Supreme Court in affirming this Court held that the language of the Pickett Act of 1910 permitted withdrawal of oil and gas lands

from leasing under the Mineral Leasing Act. 283 U.S. at 419. See also Haley v. Seaton, 108 U.S. App. D. C. 257, 281 F. 2d 620, 622-623 (1960).

In reaching its decision in the Wilbur case, the Court cited Mason v. United States, 260 U.S. 545 (1923). The Mason case was a suit by the United States to quiet title to oil lands and for an accounting for oil extracted by the defendants. Prior to defendants' development of the lands, they had been withdrawn by an Executive Order of December 15, 1908, stating that "public lands ... are ... withdrawn from settlement and entry, or other form of appropriation." The Court held that the validity of the order had been confirmed by the prior Midwest Oil Co. case, "where it was held that a similar order, issued in 1909, was within the power of the Executive." (260 U.S. at 553)

In Mason it was argued that the words of the order "or other form of appropriation" must be limited to the immediately preceding words of "settlement and entry" thus limiting the scope of the withdrawal to settlements under the Homestead Laws and not embracing the Mining Laws, which involved a "location and development" for oil claims. 4/ The Court rejected this argument holding that the words used "or other form of appropriation", certainly embraced the Mining Laws:

> "... it is insisted that the order does not apply to the cases here presented. The point sought to be made rests upon the rule of statutory construction that words may be so associated as to

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4/ Prior to 1920 oil lands were developed under the Mining Laws.

qualify the meaning which they would have standing apart. Here, it is said, the general words of the order, 'or other form of appropriation,' must be read in connection with the specific words 'settlement and entry,' immediately preceding; and that, so read, they must be restricted to appropriations of a similar kind with those specifically enumerated. The words 'settlement and entry,' it is said, apply only to the act of settling upon the soil and making entry at a land office; as, for example, under the Homestead Laws; that mining lands are acquired, not by settlement or entry, but by location and development; and that this process is not covered by the words 'other form of appropriation,' limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of construction, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules that effect should be given to every part of statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate.... We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order, and consequently were prohibited by it."
(260 U.S. at 553 - 555)

Under the holding of the Mason case, clearly the words of the 1941 Executive Order establishing the Kenai Moose Reserve withdrawing the lands from "other disposition ... under any of the public-land laws applicable to Alaska" cannot be limited to applications for "settlement" or "location" under the mining laws and only make sense under the ordinary usage of the English language if applicable to other forms of use of public lands under the public-land laws, i. e. leasing under the mineral leasing laws.

Other decisions by the Supreme Court prior to 1941 also make it clear that the language used in the 1941 Kenai Moose Range withdrawal was intended

to close the lands to oil and gas leasing. In United States v. Midwest Oil Co., 236 U.S. 459 (1915), the Court held that the President by virtue of his inherent power as head of the Executive Branch could withdraw lands containing oil deposits from location under the then applicable Mining Laws enacted by Congress. In 1909, President Taft withdrew lands by Executive Order using the following language:

> "... all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public-land laws ...."

There was no issue raised in the case as to the effectiveness of the language to withdraw the lands involved from mining for oil under the then applicable Mining Laws. In sustaining the President's power to issue the order, the Court relied heavily on custom, noting among the many instances of Executive Orders withdrawing lands from all types of entry under the public-land laws which included development for oil and gas purposes, some 44 Executive Orders regarding withdrawals for bird and wildlife purposes. (236 U.S. at 470)

The language of the withdrawal order involved in the Midwest Oil case is obviously very similar to the language used by President Roosevelt in the Executive Order withdrawal of 1941 establishing the Kenai Moose Reserve.

In another case decided just five years prior to 1941, the Supreme Court again confirmed its interpretation of the general language similar to that used in the 1941 Moose Range, as withdrawing lands containing oil deposits from rights granted by §20 of the Mineral Leasing Act of 1920. Bordieu v. Pacific

Western Oil Co., 299 U.S. 65 (1936). The lands in question had been withdrawn by the President on December 30, 1910 "from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting use and disposal of petroleum lands." The Court held as follows:

> "The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under §20 of the Leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925.... The lands here in question when entered were within the terms of the Executive Order of 1910, by which order they were 'withdrawn from settlement, location, sale or entry and reserved for classification....' Whether a 'classification' of the lands was affected by the order we need not determine since it is clear that they were 'withdrawn' by the definite and unambiguous words of the order; and, as shown by the bill, it is enough to exclude complainant from the privilege of the Act of 1920 that the lands were either withdrawn or classified .... " (299 U.S. 69-70)

Thus, in 1941 when the President issued Executive Order No. 8979 establishing the Kenai National Moose Range as a wildlife refuge, the words he employed had become words of art under the existing decisions of the courts interpreting similar withdrawal orders; in every case it had been held that the language withdrew and closed the lands to development under the applicable Mining or Mineral Leasing Laws. Appellants were entitled to rely on this law and the plain meaning of the language used creating the Range to believe that the lands therein were closed to oil and gas lease offers until opened by the express order of the Secretary of August 2, 1958 (Appendix I). All of the actions by the Department with

respect to these lands between 1941 and 1958 were consistent with this basic premise (see Statement, supra, pp. 6-10). No leases issued for any lands within the Kenai Range between 1941 and 1958, and none of the involved complex of orders and regulations pertaining to wildlife lands prior to the express order of August 2, 1958 gave any indication that the bulk of the lands therein, including those involved here, were open to oil and gas leasing. 5/ Only this view is consistent with the basic primary purpose of the Moose Range to protect -

> "the natural feeding range of the giant Kenai Moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for study in its natural environment of the practical management of a big game species that has considerable local value ..." (Ex. Order No. 8979 of December 16, 1941, 6 F.R. 6471; Appendix A)

Until the detailed agreements between the Bureau of Land Management and Fish and Wildlife Service had been worked out and published pursuant to the order of August 2, 1958 for the protection of the basic purposes of the

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5/ The lands filed on by appellant Coyle, while originally open by the terms of the 1941 Executive Order creating the Range, were closed in 1948 by Public Land Order 487 and remained closed during the time the offer conflicting with Coyle's application was filed. When these excepted lands were reopened by Public Land Order 1212 of September 9, 1955 (Appendix D), new offers were filed in this open area within the Reserve, but not on the lands covered by Coyle's application. So when Coyle filed his offer after August 14, 1958 pursuant to the terms of the order of August 2, 1958, there were no conflicting valid suspended offers for his lands pending before the Department.

Range consistent with oil and gas leasing (and even here the southern part of the Range was to remain closed), oil and gas leasing activity of any sort within the Range would have been improper. Appellants having filed their offers after the Range was opened to oil and gas lease offers and having expressly complied with the Secretary's procedures for the filing of offers thereon, were prejudiced by the illegal, arbitrary action of the Department in later declaring the lands as open to leasing prior to the express regulations and order of 1958. Until that time, lease offers on lands closed by the terms of the 1941 Executive Order (as well as Public Land Order 487 re the Coyle lands) were void. The issuance of leases by the Secretary to persons who filed before he opened the lands is in violation of the rights of the appellants as the "first qualified applicants" under the Mineral Leasing Act, and the Secretary's action should not be permitted to stand.

II. EVEN IF THE KENAI RANGE WERE OPEN SINCE 1941, THE DEPARTMENT ERRED IN ISSUING LEASES TO OTHERS AND DENYING APPELLANTS' OFFERS AS THE FIRST QUALIFIED APPLICANTS THEREFOR UNDER THE APPLICABLE LAW AND REGULATIONS.

Even if the Kenai National Moose Range were open to oil and gas leasing under the Mineral Leasing Act since created in 1941, so that the leases, based on offers prior to 1958, issued by the Department were not void for that reason alone, the Department erred in issuing those leases

and denying appellants' offers because the appellants were the first qualified applicants therefor under the applicable law and regulations.

The law is clear that once the Secretary decides to lease public lands for oil and gas purposes he is under mandatory duty, judicially enforceable, to issue such lease to the first qualified applicant. Section 17 of the Mineral Leasing Act as amended provides:

> "If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease ... shall be entitled to a lease ...." (Act of August 8, 1946, 60 Stat. 951, 30 U.S.C. §226(c) (amendatory of section 17 of the Mineral Leasing Act).)

See McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F. 2d 35, 39 (D.C. Cir. 1955).

Secretary of Interior Seaton in his order of August 2, 1958 (23 F.R. 5883; Appendix I) set up a specific procedure for determining the first applicant on lands within the Kenai National Moose Range to be thereafter available for oil and gas leasing under Section 17 of the Mineral Leasing Act:

> "The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (41 Stat. 437) and the regulations in 43 CFR, Part 192 and the provisions hereof. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.
>
> * * * *
>
> In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after

> the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m. on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8." (Emphasis supplied.)

The language of the last sentence, if it means what is says, would certainly appear to apply to "all offers" filed thereunder, including suspended offers as well as those filed after the tenth day after the agreement and map are noted on the records of the land office.

Even if the order of August 2, 1958 opening the Range could be construed as not requiring suspended offers to be treated equally with all other offers, with priorities to be determined by the drawing procedure of 43 CFR 295.8, it is clear that the offers of 1954 and 1955 conflicting with appellants' offers are not suspended offers within the meaning of the August 2 order. Such preferential treatment under the terms of the order of August 2, 1958 is narrowly limited to --

> "... Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) ..." (23 F.R. 5883, Appendix; emphasis supplied.)

43 CFR 192.9(d) were the regulations promulgated January 8, 1958 6/ which simply referred to the prior suspension orders issued by the Department:

6/ The Deputy Solicitor below admits that these regulations closed the Kenai National Moose Range to the filing of oil and gas lease offers. (J.A.37 : Appendix E to Complaint, p. 5).

> "All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b) (3) of this section shall have been completed." (Emphasis supplied; Appendix H attached.)

The crucial order, as recognized by the Deputy Solicitor below (J.A. ; Exhibit E to Complaint, p. 3), was the suspension order of August 31, 1953 which was in effect at the time the offers adverse to appellants were filed in 1954 and 1955.

The suspension order of August 31, 1953, after referring to a study being conducted of a possible revision of policy and regulations regarding the issuance of oil and gas leases within wildlife refuges, expressly provided:

> "... Pending completion of this study and the possible revision of existing regulations, you will suspend action on all pending oil and gas lease offers and applications for lands within such refuges ...." (Appendix C attached; emphasis supplied.)

The language of the order is clear and unmistaken -- only those offers were to be suspended that were pending at the date of the order. The Deputy Solicitor's contention (J.A. 35; Exhibit E to Complaint, p. 3) that the August 31, 1953 order did not close the lands to the filing of the future offers in 1954 and 1955 7/ completely misses the point. Whether or not the August 31, 1953

7/ Since the suspension was only of "pending" offers, then future offers after the date of the suspension order (August 31, 1953) must either (1) be subject to processing in the regular manner without suspension, or (2) be void. Possibility (1) must be rejected because inconsistent with the obvious purpose of the suspension order as well as the administrative practice under which no leases on lands within the Kenai National Moose Range were issued prior to 1958. Thus, the conclusion that the suspension order was designed to preclude future offers and applications for leases is the only one consistent with the administrative practice with respect to the Range, not to mention fair treatment of all applicants for oil and gas leases thereon when properly opened for leasing.

order had the effect of closing the Range to future offers, it is crystal clear that only those offers which were "pending" as of the date of the order were suspended offers. Any other reading would do violence to the clear language of the suspension order affecting only pending offers and applications. Accordingly, the 1954 and 1955 offers were not within the language of the August 2, 1958 order relating to "offers to lease ... which have been pending and upon which action was suspended" upon which the Deputy Solicitor relies in claiming special priority treatment for the 1954 and 1955 offers.

The Deputy Solicitor's action in treating these offers as though pending prior to the August 31, 1953 order is obviously arbitrary and prejudicial to appellants. Why should applicants who file oil and gas lease offers for wildlife lands upon which all oil and gas leasing action has been suspended pending study of a revision of policy and regulations to determine whether any leasing will ever be permitted (i.e. see the southern part of the Range) or if so, upon what special conditions, be entitled to a preference over those who file in accordance with the regulations and procedures when finally promulgated which expressly set forth that portion of the Range to be opened, the special conditions and requirements for all leases to protect wildlife, and finally express procedures for the determination of priority among all offers filed therefor?

The appellants complied with all of the procedures set forth by the Secretary in his order of August 2, 1958, as well as the applicable

regulations in filing their offers for the lands. The persons to whom the leases were issued did not comply with these procedures. Without notice to the appellants, the Department issued leases to these persons in the fall of 1958. After a year later in September 1959 the Bureau of Land Management held a public drawing pursuant to the procedures set forth in the order of August 2, 1958, in which appellants offers, but not those to whom the leases were issued, were specifically included (J.A. 18 ; Exhibit C to Complaint). After the drawing, appellants were selected as the first applicants for the lands of those participating in the drawing. They did not know that the lands had been leased a year earlier until the October, 1959 decisions by the Land Office rejecting their offers.

In the final analysis, this case is the exact converse of the recent decision of this Court in Thor-Westcliffe Development, Inc. v. Udall, (CADA No. 17101, January 24, 1963). In Thor-Westcliffe, the Secretary sought to sustain regulations similar to those contained in his order of August 2, 1958 setting up procedures for a drawing to determine a fair method of determining priority among applicants. The validity of such regulations was challenged by an applicant who filed his offer for the lands, similar to the 1954 and 1955 offers, prior to the time that the Secretary published the order setting up the procedure for simultaneous consideration of all offers after a certain subsequent date with priority to be determined by a drawing. The applicant there as here shunned the drawing procedure. This Court in Thor-Westcliffe held that the applicant, although his offer was for open lands and was filed

prior to the order setting up the procedure for subsequent offers and a drawing, was not entitled to a lease. The Secretary's power to establish these procedures "to end the mad scrambles, breaches of the peace, damage to tract books, and corruption of land office employees as applicants compete" was sustained. But in the present case, the appellee seeks to completely disregard the similar drawing procedures he established for the determination of priority among lease applicants for the lands to be leased in the Kenai National Moose Range, to sustain his grant of the secret preference leases. If the regulations as established by Thor-Westcliffe are valid, then the Department's refusal to comply with them was clearly arbitrary and capricious. McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F. 2d 35 (D.C. Cir. 1955).

III. THE ISSUANCE OF THE LEASES FOR LANDS WITHIN THE MOOSE RANGE TO OTHERS AT 25 CENT RENTALS WAS IN VIOLATION OF PUBLIC-LAW 85-505 REQUIRING 50 CENT RENTALS.

In 1958 Section 22 of the Mineral Leasing Act, 30 U.S.C. §251 was amended to provide:

> "... That the annual lease rentals for lands in the Territory of Alaska not within any known geological structure of a producing oil or gas field ... shall be identical with those prescribed for such leases covering similar lands in the States of the United States, except that leases which may issue pursuant to applications or offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958, shall require the payment of twenty-five cents per acre as lease rental for the first year of such leases ..." (Public Law 85-505, July 3, 1958.)

Prior to this amendment, Section 22 gave the Secretary of the Interior discretion to establish the lease rental for Alaska lands; and the Secretary, by regulation, had fixed the rental at twenty-five cents for the first year, while requiring a rental of fifty cents per acre for non-competitive leases within the continental United States. 43 CFR §192.80.

It is clear from the language of the statute and from the legislative history that, with a single exception, it was intended to erase the rental preference which the Secretary's regulations had given to lessees of Alaskan lands (S. Rep. No. 1720, 85th Cong. 2d Sess., 1958 U.S. Code Cong. & Ad. News 2893, 2896-97). Thus, unless the leases which were issued upon the lands for which the appellants made application were either issued for rentals "identical with those prescribed for such leases covering similar lands in the States of the United States" or come within the exception, the leases were issued in violation of the terms of the Mineral Leasing Act.

The first alternative requires little discussion. The regulations in effect at the time these leases issued required a first year's rental of fifty cents per acre for lands within the continental United States. Yet the leases were issued for rentals of twenty-five cents an acre. Thus, it appears incontrovertible that unless the exception is applicable, the Secretary had no power to issue them. United States v. Essley, 284 F.2d 518, 520 (10th Cir. 1960); cf. McKay v. Walenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955).

This leaves for consideration the applicability of the exception. The opinion of the Deputy Solicitor construed the clause "which applications or offers were filed prior to and pending on May 3, 1958" to include any applications or offers which were filed prior to May 3, 1958, but upon which action had not been taken for any reason (J.A. ; Exhibit F to Complaint, pp. 6-7). It is submitted that this construction is erroneous and that the exception is in reality a narrow one which excludes applications or offers for lands upon which leasing was closed or suspended.

First, the choice of language dictates this result. By restricting the exception to "pending" applications, Congress obviously intended applications upon which leases could issue, but had not because of a delay in processing. If Congress had intended the construction adopted by the Deputy Solicitor, the use of the term "pending" becomes incongruous, for it is difficult to see how an application upon which no action could be taken, i. e., a suspended application in the Moose Range which had been closed at least since January 8, 1958, can be considered a "pending" application.

The legislative history supports this narrow construction of the exception. The amendment originated as a Senate committee amendment to H.R. 8054. The hearings held before the Senate Committee on Interior and Insular Affairs on April 25, May 15 and 27, 1958 reveal that the committee was well aware of an existing delay in processing caused by the

increased numbers of applications in open public land areas following the discovery of oil on the Kenai Peninsula in July of 1957, and the shortage of trained personnel in the Bureau of Land Management. Hearings on H.R. 8054 before the Senate Committee on Interior and Insular Affairs, 19, 93-94. The discovery as well as the increased activity were in areas of the Peninsula outside of the Kenai National Moose Range where all leasing activity had been closed or suspended many years. 8/ And in a letter dated May 21, 1958 to Senator Anderson, Secretary Seaton suggested that because leases were granted on an area, rather than on a priority basis, "the committee may wish to give consideration to providing that lease offers which had been pending prior to some specified date deemed generally equitable would not be affected by the proposed increase in the rental and royalty rates." Id. at 109. The Secretary obviously was not referring to any offers in the Kenai Range because it is undisputed that the Range was closed on January 8, 1958 (J.A. 37 ; Exhibit E to Complaint, p. 5). These hearings make it clear that the Senate created the exception specifically to provide for those applicants whose offers had not been acted on due to the administrative lag in processing applications, and for no other reason.

There is further evidence that this was the intent of Congress in House discussion of the amendment. There Representative Saylor, on June 25, 1958,

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8/ See suspension orders of August 31, 1953 and early 1956 (Appendixes C & G) At the time of the hearings the Kenai National Moose Range was admittedly closed to oil and gas lease offers by the regulations of January 8, 1958 (23 F.R.; Appendix I).

after outlining the provisions of the bill, stated:

> "In this connection I should like to commend Secretary Seaton for his repeated urging that if Congress enacts legislation affecting lease rentals in Alaska, it should protect the equities of the thousands of individuals who had filed during the past several months, but whose applications had not been processing as of the date of the suspension."
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> * * * *
>
> "... The personal pleas of the Secretary ... and the response of Members of the other body to those pleas resulted in establishing the official date of the increased rentals as May 3." (104 Cong. Rec. 12258 (1958); emphasis supplied.)

The only inference which can be drawn consistent with the plain language of the exception and with its legislative history is that Congress intended to exempt only those applicants who would otherwise fall victim to the clogged administrative processes of the Bureau of Land Management on lands open to leasing. Certainly, the leases under consideration here do not fall within that category.

CONCLUSION

For these reasons, appellants submit that the court below erred in refusing to grant appellants' motion for summary judgment and in granting appellee's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief for appellants were served on Edmund Clark, Justice Department, Washington 25, D.C., attorney for appellee by depositing in the mail, postage prepaid, this 20th day of March, 1963.

Charles F. Wheatley, Jr.

Charles F. Wheatley, Jr.

APPENDIX A

Executive Order No. 8979, December 16, 1941 (6 F.R. 6471)

EXECUTIVE ORDER

ESTABLISHING THE KENAI NATIONAL MOOSE RANGE

ALASKA

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192–211, as amended:

SEWARD MERIDIAN

Beginning at the point of intersection of the west boundary of the Chugach National Forest with the line of mean high tide on the south shore of Chickaloon Bay, in Turnagain Arm of Cook Inlet, in latitude 60° 58' N., and longitude 150° W.;

Thence from said initial point,

Northwesterly with the meanders of the line of mean high tide, on the south shore of Chickaloon Bay to Point Possession;

Thence southwesterly with the meanders of the line of mean high tide on the east shore of Cook Inlet to the Kasilof River;

Thence southeasterly, upstream along the right bank of the Kasilof River to the meander corner on the south boundary of sec. 33, T. 3 N., R. 11 W., Seward meridian;

Thence west, 4.00 chains, to meander corner on south boundary of sec. 32, T. 3 N., R. 11 W.;

Thence southwesterly, along the crest of the watershed, to the divide between the waters flowing into Tustumena Lake and the waters flowing into Cook Inlet and Kachemak Bay;

Thence southeasterly, along said divide to the confluence of the Fox River and the principal stream flowing from Dinglestadt Glacier;

Thence southeasterly, up said stream and across Dinglestadt Glacier to the crest of Kenai Mountains;

Thence northeasterly, along the crest of Kenai Mountains to the west boundary of Chugach National Forest at a point three miles southeasterly from the head of Upper Russian Lake;

Thence northerly, along the west boundary of Chugach National Forest to the place of beginning.

The area described including both public and non-public lands, aggregates 2,000,000 acres.

None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360–361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471–471e: *Provided, however,* That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: *Provided further,* That the lands in the said excepted areas shall be classified by the General Land Office, Department of the Interior, and those lands classified as not suitable for settlement shall no longer be available for that purpose: *Provided further,* That the reservation for the national moose range shall not operate to prevent the construction and operation of a highway to connect the area open to settlement with the Seward-Sunrise road by the most practicable route: *Provided further,* That any lands within the described area that are otherwise withdrawn or reserved shall be affected by this order only so far as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made.

The provisions of this order shall not prohibit the hunting or taking of moose and other game animals and game birds or the trapping of fur animals in accordance with the provisions of the said Alaska Game Law, as amended, and as may be permitted by regulations of the Secretary of the Interior prescribed and issued pursuant thereto.

This reservation shall be known as the Kenai National Moose Range.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
December 16, 1941.

[No. 8979]

[F. R. Doc. 41-9801; Filed, December 17, 1941; 11:56 a. m.]

APPENDIX B

Public Land Order No. 487, June 16, 1948 (13 F.R. 3462)

[Public Land Order 487]

ALASKA

WITHDRAWING PUBLIC LANDS FOR CLASSIFICATION AND EXAMINATION AND IN AID OF PROPOSED LEGISLATION

By virtue of the authority vested in the President by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U. S. C. Title 43, secs. 141-143), and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the public lands within the following-described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation:

[illegible] Area

[illegible]

[illegible]
T. 5 N., Rs. 8 & 9 W.
T. 4 N., R. 10 W., unsurveyed.
Secs. 4 to 9, inclusive;
Sec. 18.
T. 5 N., R. 10 W.
T. 6 N., R. 10 W.
Secs. 30 & 31.

[illegible]
T. 3 N., R. 11 W., unsurveyed,
Secs. 4 to 9, inclusive.
T. 5 N., R. 11 W.
Sec. 1, unsurveyed;
Secs. 4 to 9, inclusive;
Sec. 10, unsurveyed;
Secs. 16 to 21, inclusive;
Secs. 28 to 33, inclusive.
T. 4 N., R. 11 W., partly unsurveyed.
T. 5 N., R. 11 W.
T. 6 N., R. 11 W.
Secs. 25 to 36, inclusive.
T. 3 N., R. 12 W.
Sec. 1, unsurveyed;
Secs. 2, 3, 4, 9 and 10;
Secs. 11 and 12, unsurveyed.
Tps. 4, 5 and 6 N., R. 12 W.
T. 6 N., R. 13 W.
Secs. 3 and 4;
Secs. 11 to 14, inclusive;
Secs. 23 to 26, inclusive;
Secs. 35 and 36.

The areas described aggregate 109,974 acres, including public and non-public lands.

Denali Area

[illegible]

T. 1 S., R. 5 W.
Sec. 31.
T. 2 S., R. 5 W., unsurveyed.
Secs. 6 and 7.
T. 3 S., R. 5 W.
Secs. 1 to 4, inclusive,
Secs. 5, 6 and 7, unsurveyed;
Secs. 8 to 18, inclusive;
Secs. 19 to 24, inclusive, unsurveyed;
Secs. 29 and 31.
T. 3 S., R. 7 W.
Secs. 12, 13, 24, 25, 26 and 36, unsurveyed;
Secs. 35 and 36.
T. 2 S., R. 7 W.
Secs. 1, 2 and 3;
Secs. 4 and 5, unsurveyed;
Secs. 9 to 13, inclusive;
Secs. 16 and 17;
Sec. 18, unsurveyed;
Secs. 19 and 20.

The areas described aggregate 22,437 acres of public land.

This order shall take precedence over, but shall not modify, the withdrawal for classification for national-monument purposes made by Executive Order No. 7888 of May 16, 1938; the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941; the withdrawal for administrative site purposes made by Public Land Order No. 390 of August 4, 1947; and the withdrawals for air-navigation site purposes made by the orders of the Secretary of the Interior dated March 17, 1941, and October 10, 1942 (Air-Navigation Site Withdrawal No. 156), and the order of the Secretary of the Interior dated May 26, 1948 (Air-Navigation Site Withdrawal No. 248).

C. GIRARD DAVIDSON,
Acting Secretary of the Interior.

JUNE 16, 1948.

[F. R. Doc. 48-5412; Filed, June 22, 1948; 8:48 a. m.]

EXECUTIVE ORDER 9337

AUTHORIZING THE SECRETARY OF THE INTERIOR TO WITHDRAW AND RESERVE LANDS OF THE PUBLIC DOMAIN AND OTHER LANDS OWNED OR CONTROLLED BY THE UNITED STATES

By virtue of the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, and as President of the United States, it is ordered as follows:

Section 1. The Secretary of the Interior is hereby authorized to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States to the same extent that such lands might be withdrawn or reserved by the President, and also, to the same extent, to modify or revoke withdrawals or reservations of such lands: *Provided*, That all orders of the Secretary of the Interior issued under the authority of this order shall have the prior approval of the Director of the Bureau of the Budget and the Attorney General, as now required with respect to proposed Executive orders by Executive Order No. 7298 of February 18, 1936, and shall be submitted to the Division of the Federal Register for filing and publication: *Provided, further*, That no such order which affects lands under the administrative jurisdiction of any executive department or agency of the Government, other than the Department of the Interior, shall be issued by the Secretary of the Interior without the prior concurrence of the head of the department or agency concerned.

Section 2. This order supersedes Executive Order No. 9146 of April 24, 1942, entitled "Authorizing the Secretary of the Interior to Withdraw and Reserve Public Lands".[1]

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
April 24, 1943.

[F. R. Doc. 43-6480; Filed, April 26, 1943; 3:15 p. m.]

APPENDIX C

BLM Suspension Order, August 31, 1953

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

M:LEH

August 31, 1953

Memorandum

To: Regional Administrators, Regions I to VII, inclusive
Managers, Land and Land and Survey Offices

From: Director, Bureau of Land Management

Subject: Oil and Gas Offers in Fish and Wildlife Refuges

A study is now being conducted by Assistant Secretary Lewis, and all the Bureaus involved, of a possible revision of policy and regulations in the issuance of oil and gas leases within wildlife refuges, both on the public domain and acquired lands. Pending the completion of this study and the possible revision of existing regulations, you will suspend action on all pending oil and gas lease offers and applications for lands within such refuges. Where an offer or an application embraces land partly within and partly without a wildlife refuge, you will suspend action on the portion of the offer or application within the refuge and process, in the absence of any objections, the offer or application to lease as to the land without the refuge.

Action on pending appeals from rejection of such offers or applications will be suspended until the study is completed, a policy is established and the regulations revised in accordance therewith. Likewise, applications of this nature which have been held for rejection will also be suspended pending the completion of this study.

William Zimmerman, Jr.

Acting Director

Copy to: Each RA
Each LO and L&SO
Assistant Secretary Lewis
Director, F&W Service
Director
Chief Counsel
Div. of Minerals (10)

APPENDIX D

Public Land Order No. 1212, September 9, 1955 (20 F.R. 6795)

[Public Land Order 1212]

[Anchorage 024518]

[Misc 33331]

ALASKA

REVOKING PUBLIC LAND ORDER NO. 487 OF JUNE 16, 1948. RESERVING PORTIONS OF RELEASED LANDS PENDING CLASSIFICATION AND OTHER PUBLIC PURPOSES

By virtue of the authority vested in the President by Section 1 of the act of June 25, 1910 (36 Stat. 847; 43 U. S. C. 141), and otherwise, and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

1. Public Land Order No. 487 of June 16, 1948, which temporarily withdrew the following-described land from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation, which was partially revoked by Public Land Orders No. 558, 653, 751, 778, 800, 812, 820, 839, 977, 1006, and 1020, is hereby revoked in its entirety:

KENAI-KASILOF AREA

SEWARD MERIDIAN

T. 5 N., Rs. 8 and 9 W.
T. 4 N., R. 10 W., unsurveyed.
  Secs. 4 to 9, incl.;
  Sec. 18.
T. 5 N., R. 10 W.
T. 6 N., R. 10 W.,
  Secs. 30 and 31.
T. 2 N., R. 11 W., unsurveyed.
  Secs. 4 to 8, incl.
T. 3 N., R. 11 W.
  Sec. 3, unsurveyed;
  Secs. 4 to 9, incl.;
  Sec. 10, unsurveyed;
  Secs. 16 to 21, incl.;
  Secs. 28 to 33, incl.
T. 4 N., R. 11 W., partly unsurveyed
T. 5 N., R. 11 W.
T. 6 N., R. 11 W.
  Secs. 22 to 36, incl.
T. 2 N., R. 12 W.,
  Sec. 1, unsurveyed;
  Secs. 2, 3, 4, 9 and 10;
  Secs. 11 and 12, unsurveyed.
Tps. 3, 4 and 5 N., R. 12 W.
T. 6 N., R. 12 W.,
  Secs. 2 and 3;
  Secs. 11 to 14, incl.;
  Secs. 23 to 26, incl.,
  Secs. 35 and 36.

The areas described aggregate 160,974 acres, including public and non-public lands.

2. Subject to valid existing rights, the following-described lands are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes:

SEWARD MERIDIAN

T. 5 N., R. 10 W.,
  Sec. 10, lots 2, 3, 4, 6, 7, 8, 9, 10, 11;
  Sec. 27, SE¼NW¼;
  Sec. 33, lots 9, 10, S½SE¼;
  Sec. 34, lots 8, 9.

The areas described aggregate 568.68 acres.

3. The status of the following-described lands shall not be changed until it is so provided by an order of classification to be issued by an authorized officer opening the lands to application under the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U. S. C. 682a) as amended, with a 91-day preference-right period for filing such applications by veterans of World War II, the Korean Conflict, and other qualified persons entitled to preference under the act of September 27, 1944 (58 Stat. 747; 43 U. S. C. 279–284) as amended, or providing for the disposal of the lands under the provisions of the Alaska Public Sale Act of August 30, 1949 (63 Stat. 679; 48 U. S. C. 364a et seq.), or the Recreation Act of June 4, 1954 (68 Stat. 173; 43 U. S. C. 869), as amended:

SEWARD MERIDIAN

T. 5 N., R. 9 W.,
Sec. 11, lots 1 through 16;
Sec 12, lots 1 through 12.
T. 5 N., R. 10 W.,
Sec. 31, lots 5, 6, 9, 12, 13, NW¼SE¼, S½SE¼.
T. 5 N., R. 11 W.,
Sec 3, lots 1, 2, 3, 4;
Sec. 4, lots 1, 2;
Sec 19, lots 7, 8, 9, 11, 13, E½E½SE¼SW¼;
Sec 30, lots 5 to 9 incl., 11 to 15 incl.;
Sec. 31, lots 3, 4, 5, 7 to 10 incl.
T. 6 N., R. 11 W.,
Sec. 33, S½SE¼.
T. 4 N., R. 12 W.,
Sec. 1, lots 1 to 4 incl., 6;
Sec. 12, lots 5 to 18 incl., 20, E½W½E½;
Sec. 13, lots 5 to 12 incl., 15 to 17 incl., 21, E½W½SW¼NE¼, E½W½NW¼SE¼;
Sec. 24, lots 4 to 8 incl., 11, 16 to 19 incl.;
Sec. 25, lots 5, 6, 9 to 13, 16 to 22 incl., E½W½NE¼NW¼.
T. 6 N., R. 12 W.,
Sec. 3, lots 4 to 7 incl., 9 to 13 incl., E½NE¼NE¼, E½NE¼SE¼NE¼;
Sec. 11, lots 3, 6;
Sec. 14, lots 5 to 11 incl., 13 to 15 incl., E½SE¼NW¼, E½NE¼SW¼, NE¼SE¼SW¼, E½SE¼SE¼SW¼;
Sec. 23, lots 5, 6, 7, 9, 10, 12 to 18 incl., E½W½SW¼SW¼SE¼, E½NE¼NE¼NW¼, NW¼SW¼SE¼, E½SW¼SW¼SE¼, E½SW¼SE¼;
Sec. 25, NE¼NW¼;
Sec. 26, lots 6, 8, 9 to 20 incl., E½NW¼NE¼, E½NE¼SW¼NE¼, NW¼NE¼SE¼, E½NE¼SE¼, E½SW¼NE¼SE¼, NE¼SE¼SE¼, E½SE¼SE¼SE¼.

The areas described aggregate 1,676.11 acres of public lands.

4. This order shall not otherwise become effective to change the status of the remaining lands until 10:00 a. m. on the 35th day after the date of this order. At that time the said lands shall become subject to settlement, application, petition and selection as follows:

For a period of 91 days commencing at the date and on the hour hereinafter specified, the following-described public lands released from withdrawal by paragraph 1 of this order shall, subject to valid existing rights and the provisions of existing withdrawals, become subject (1) to application as indicated, and to the indicated form of appropriation only by qualified veterans of World War II, the Korean Conflict and by other qualified persons entitled to preference under the act of September 27, 1944 (58 Stat. 747; 43 U. S. C. 279–284) as amended, subject to the requirements of applicable law, and (2) application under any applicable public-land law, based on prior existing valid settlement rights and preference rights conferred by existing laws, or equitable claims subject to allowance and confirmation. Applications under subdivision (1) of this paragraph shall be subject to applications and claims of the classes described in subdivision (2) of this paragraph:

(a) At 10:00 a. m. on the 35th day after the date of this order, to application under the homestead laws only:

HOMESTEAD SELECTION UNIT OPENING No. 1

[redacted]

Seward Meridian

T. 5 N., R. 10 W.,
Unit No.:
54—Sec. 18, lot 12;
Sec. 19, lots 4, 5, 6, 8.
T. 4 N., R. 11 W.,
Unit No.:
1—Sec. 12, W½SW¼;
Sec. 13, NW¼NW¼;
Sec. 14, NE¼NE¼.
2—Sec. 10, SE¼.
5—Sec. 11, NE¼.
7—Sec. 2, SW¼.
9—Sec. 3, SW¼.
11—Sec. 3, lots 3, 4, S½NW¼.
13—Sec. 2, lots 3, 4, S½NW¼.
15—Sec. 1, lots 3, 4, S½NW¼.
T. 5 N., R. 11 W.,
17—Sec. 35, SW¼.
19—Sec. 34, SW¼.
21—Sec. 34, NE¼.
23—Sec. 35, NE¼.
25—Sec. 25, SW¼.
27—Sec. 26, SW¼.
29—Sec. 27, SW¼.
31—Sec. 28, S½SW¼;
Sec. 29, SE¼SE¼;
Sec. 32, NE¼NE¼.
33—Sec. 28, NE¼.
34—Sec. 27, NE¼.
36—Sec. 26, NE¼.
38—Sec. 24, lot 9, W½SW¼;
Sec. 25, NW¼NW¼.
40—Sec. 23, SW¼.
42—Sec. 22, SW¼.
45—Sec. 21, NE¼.
47—Sec. 22, NE¼.
49—Sec. 24, lot 3, W½NW¼, NE¼NW¼.
51—Sec. 13, lot 1, S½NW¼, NE¼NW¼.

The areas described aggregate 4,327.35 acres of public lands embraced in 27 units.

(b) At 10:00 a. m. on the 63d day after the date of this order, to application under the homestead laws only:

HOMESTEAD SELECTION UNIT OPENING No. 2

[redacted]

Seward Meridian

T. 4 N., R. 11 W.,
Unit No.:
3—Sec. 11, SE¼.
4—Sec. 10, NE¼.
6—Sec. 2, SE¼.
8—Sec. 9, SE¼.
10—Sec. 4, E½E½, unsurveyed.
12—Sec. 3, lots 1, 2, S½NE¼.
14—Sec. 2, lots 1, 2, S½NE¼.
T. 5 N., R. 11 W.,
16—Sec. 35, SE¼.
18—Sec. 34, SE¼.
20—Sec. 33, N½NE¼; Sec. 34, N½NW¼.
22—Sec. 35, NW¼.
24—Sec. 25, lots 1, 2, N½SE¼.
26—Sec. 26, SE¼.
28—Sec. 27, SE¼.
30—Sec. 28, SE¼.
33—Sec. 27, NW¼.
35—Sec. 26, NW¼.
37—Sec. 25, S½N½.
39—Sec. 23, SE¼.
41—Sec. 22, SE¼.
43—Sec. 21, SE¼.
44—Sec. 20, NW¼.
46—Sec. 22, NW¼.
48—Sec. 14, lot 11; Sec. 23, W½NW¼, SE¼NW¼.
50—Sec. 13, SW¼.
52—Sec. 13, E½NE¼, SW¼NE¼, NW¼SE¼.
53—Sec. 12, S½SE¼; Sec. 13, NW¼NE¼; Sec. 7, lot 14 (T. 5 N., R. 10 W.).

The areas described aggregate 4,543.54 acres of public lands embraced in 27 units.

(c) At 10:00 a. m. on the 91st day after the date of this order, to settlement under the homestead laws or the Alaska Home Site Act of May 26, 1934 (48 Stat. 809; 48 U. S. C. 461) or the Small Tract Act of June 1, 1938 (52 Stat. 609, 43 U. S. C. 682a) as amended:

The unsurveyed public lands released from withdrawal by paragraph 1 of this order, and not otherwise rewithdrawn or restored.

(d) At 10:00 a. m. on the 91st day after the date of this order, to application under the homestead laws or the Alaska Home Site Act of May 26, 1934 (48 Stat. 809; 48 U. S. C. 461) or the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U. S. C. 682a) as amended:

The surveyed public lands released from withdrawal by paragraph 1 of this order and not otherwise restored by paragraphs 4 (a) or 4 (b), or described in paragraph 3.

5. All applications received under either paragraph 4 (a), 4 (b) or 4 (d) of this order, at or before 10:00 a. m. of the day specified in either of such paragraphs for the receipt of applications thereunder, shall be treated as though simultaneously filed at that time. All applications filed under such paragraphs after 10:00 a. m. of the day specified in either of such paragraphs for the filing of applications thereunder, shall be considered in the order of filing.

6. Any of the lands described in paragraphs 4 (a), 4 (b) or 4 (d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws, as follows:

(a) As to the lands described in paragraph 4 (a), at 10:00 a. m. on the 126th day after the date of this order.

(b) As to the lands described in paragraph 4 (b), at 10:00 a. m. on the 154th day after the date of this order.

(c) As to the lands described in paragraph 4 (d), at 10:00 a. m. on the 182nd day after the date of this order.

All applications filed either at or before 10:00 a. m. of such 126th, 154th, or 182nd day, including applications under the mineral-leasing laws, shall be treated as though simultaneously filed at the hour specified on such day. All applications, including applications under the mineral-leasing laws, filed under this paragraph after such 126th, 154th, or 182nd day, shall be considered in the order of filing. Mining locations made prior to such 126th, 154th, or 182nd day, as the case may be, shall be invalid.

7. Commencing at 10:00 a. m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4 (c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, including leasing under the mineral-leasing laws, in accordance with appropriate laws and regulations. All applications, including applications under the mineral-leasing laws, filed either at or before 10:00 a. m. of such 182nd day, shall be treated as though simultaneously filed at the hour specified on such 182nd day. All applications, including applications under the mineral-leasing laws, filed under this paragraph after such 182nd day shall be considered in the order of filing. Mining locations made prior to such 182nd day shall be invalid.

2. A veteran shall accompany his application with a complete photostatic, or other copy (both sides), of his certificate of honorable discharge or of an official document of his branch of the service which shows clearly his honorable discharge as defined in § 181.36 of Title 43 of the Code of Federal Regulations, or constitutes evidence of other facts upon which the claim for preference is based and which shows clearly the period of service. Other persons claiming credit for service of veterans must furnish like proof in support of their claims. Persons asserting preference rights, through settlement or otherwise, and those having equitable claims, shall accompany their applications by duly corroborated statements in support thereof, setting forth in detail all facts relevant to their claims.

3. Applications for these lands, which shall be filed in the Land Office, Bureau of Land Management, Anchorage, Alaska, shall be acted upon in accordance with the regulations contained in § 295.8 of Title 43 of the Code of Federal Regulations to the extent that such regulations are applicable. Applications under the homestead laws shall be governed by the regulations contained in Parts 65 and 66 of Title 43 of the Code of Federal Regulations, and applications under the Alaska Home Site Act of May 26, 1934, and the Small Tract Act of June 1, 1938, as amended, shall be governed by the regulations contained in §§ 64.6 to 64.10 inclusive, and Part 257 of that title.

Inquiries concerning these lands shall be addressed to the Manager, Land Office, Bureau of Land Management, Anchorage, Alaska.

ORME LEWIS,
Acting Secretary of the Interior.

SEPTEMBER 9, 1955.

[F. R. Doc. 55-7464. Filed Sept. 14, 1955; 8:50 a. m.]

APPENDIX E

Amendment to Public Land Order 1212,
October 14, 1955 (20 F.R. 7904)

[Public Land Order 1212, Amdt.]
[22331]

ALASKA

AMENDING PUBLIC LAND ORDER NO. 1212 OF SEPTEMBER 9, 1955, WHICH REVOKED PUBLIC LAND ORDER NO. 487 OF JUNE 16, 1948

OCTOBER 14, 1955.

Paragraphs No. 6 and 7 of Public Land Order No. 1212 of September 9, 1955, appearing as Doc. 55-7464 in 20 F. R. 6795 of the issue of September 16, 1955, are hereby amended by deleting therefrom the phrases "including the mineral leasing laws", "including applications under the mineral leasing laws" and "including leasing under the mineral leasing laws," wherever they appear, and by adding after the words "mining locations" in the last sentence of paragraphs 6 and 7 of the order the words "for non-metalliferous minerals."

EDWARD WOOLLEY,
Director.

[F. R. Doc. 55-8494; Filed, Oct. 19, 1955; 8:47 a. m.]

TITLE 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

[Circular 1945]

PART 192—OIL AND GAS LEASES

LEASING OF WILDLIFE REFUGE LANDS

Section 192.9 is amended to read as follows.

§ 192.9 *Leasing of wildlife refuge lands.* (a) Geological and geophysical prospecting permits may be issued by the Fish and Wildlife Service on areas subject to its jurisdiction prior to leasing under such terms and conditions as that Service may prescribe.

(b) (1) Areas determined to be indispensable for the preservation of rare or endangered species, remnant big-game herds, and irreplaceable examples of unique animal or plant ecology are not available for leasing. Areas in this category at present are included in Appendix A. Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that: on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness, recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes. Areas in this category are listed in Appendix B.

(2) The following conditions shall be expressed in any lease issued under this section:

(i) Geological and geophysical prospecting conducted on the leased premises shall be of a type and at a time satisfactory to the Fish and Wildlife Service.

(ii) No drilling operations shall be conducted under the lease until such lease has been committed to an approved unit plan. However, the Secretary may, in his discretion, permit or require drilling if he determines that a unit plan including the leased area cannot be secured and that drilling is necessary to protect the interests of the United States.

(c) A unit agreement which includes lands administered for wildlife conservation shall contain a provision that no drilling operations may be conducted on the unitized portion of the Government-leased lands administered for wildlife conservation without the consent and approval of the Fish and Wildlife Service as to the time, place, and nature of such operations.

(d) In every instance, a plan of development which includes lands administered for wildlife conservation shall not be approved without the concurrence of the Fish and Wildlife Service.

(iii) Lessees shall observe and comply with all State and Federal laws and regulations relating to wildlife and shall take such action as is necessary to assure observance and compliance with these laws and regulations by lessees, employees and agents.

(Sec. 32, 41 Stat. 450; 30 U. S. C. 189)

DOUGLAS MCKAY,
Secretary of the Interior.

APPENDIX A—FISH AND WILDLIFE SERVICE LANDS NOT AVAILABLE FOR LEASING

Alaska:
  Certain of the Aleutian Islands.
Georgia:
  Okefenokee.
Hawaii: [1]
  Certain of the Hawaiian Islands.
Maryland:
  Patuxent.
Montana:
  National Bison Range.
  Red Rock Lakes.
Nebraska:
  Fort Niobrara.
North Dakota:
  Sullys Hill.
Oklahoma:
  Wichita Mountains.
Texas:
  Aransas.
  Santa Ana.
Wyoming:
  National Elk.

APPENDIX B—FISH AND WILDLIFE SERVICE LANDS AVAILABLE FOR LEASING UNDER A SATISFACTORY DEVELOPMENT AND OPERATING PLAN

Alabama:
  Petit Bois (see also Mississippi).
  Wheeler.
Alaska:
  Chamisso.
  Hazen Bay
  Hazy Island.
  Kenai: The following areas and all lands within one mile of Tustemena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats
  Pribilof Islands.
  St Lazaria.
  Semidi.
Arizona:
  Cabeza Prieta Game Range.
  Havasu Lake (see also California).
  Imperial (see also California).
  Kofa Game Range: All Range lands in T. 1 N., Rs. 15–18 W.; T. 2 N., Rs. 16 & 17 W.; T. 1 S., Rs. 15–18 W.; T. 2 S., Rs. 15–19 W.; T 3 S, Rs 15, 18, & 19 W.; T. 4 S., R. 17 West ½; T. 5 S., Rs. 17 & 18 W.; T. 4 S., R. 18 W.

[1] The regulations in 43 CFR, Part 192 do not apply to the Territory of Hawaii.

Arkansas:
Big Lake.
White River.
California:
Clear Lake.
Colusa.
Farallon.
Havasu Lake (see also Arizona).
Imperial (see also Arizona).
Lower Klamath (see also Oregon).
Sacramento.
Salton Sea.
Sutter.
Tule Lake.
Colorado:
Monte Vista:
Delaware:
Bombay Hook.
Killcohook (see also New Jersey).
Florida:
Anclote.
Brevard.
Cedar Keys.
Chassahowitzka.
Chinsegut.
Great White Heron.
Key West.
Loxahatchee.
Passage Key.
Pelican Island.
Pinellas.
Sanibel.
St. Marks: All refuge lands in Ts. 4 and 5 S., Rs. 1, 2, and 3 E., T. M., and refuge lands in the Hartsfield Survey.
Georgia:
Blackbeard Island.
Savannah (see also South Carolina).
Tybee.
Wolf Island.
Idaho:
Camas.
Deer Flat.
Minidoka.
Snake River.
Illinois:
Chautauqua.
Crab Orchard.
Lands made available by the Corps of Engineers on the Mississippi River between Rock Island and Alton, Illinois (see also Iowa and Missouri).
Upper Mississippi River Wild Life and Fish Refuge (see also Iowa, Minnesota, and Wisconsin).
Iowa:
Lands made available by the Corps of Engineers on the Mississippi River between Rock Island and Alton, Illinois (see also Illinois and Missouri).
Union Slough.
Upper Mississippi River Wild Life and Fish Refuge (see also Illinois, Minnesota, and Wisconsin).
Kansas:
Kirwin Wildlife Management Area.
Kentucky:
Kentucky Woodlands.
Louisiana:
Lacassine.
Shell Keys.
Maine:
Widow's Island.
Maryland:
Blackwater.
Chincoteague (see also Virginia).
Glenn Martin.
Massachusetts:
Great Meadows.
Monomoy.
Parker River.
Michigan:
Huron.
Michigan Islands.
Seney.
Shiawassee.
Minnesota:
Beltrami Wildlife Management Area.
Mille Lacs.
Mud Lake.
Rice Lake.
Tamarac.
Talcot.
Upper Mississippi River Wild Life and Fish Refuge (see also Illinois, Iowa, and Wisconsin).
Mississippi:
Morgubee: All refuge lands in the following subdivisions: T. 17 N., R. 13 E., secs. 13, 14, 23, 24, 26, 28, and 26; T. 16 N., R. 14 E., secs. 1–4, 9–16, and 21–24; T. 17 N., R. 14 E., secs. 31–36; T. 16 N., R. 15 E., secs. 4–9 and 16–21.
Petit Bois (see also Alabama).
Missouri:
Mingo.
Lands made available by the Corps of Engineers on the Mississippi River between Rock Island and Alton, Illinois.
Missouri Wildlife Management Area.
Squaw Creek.
Swan Lake.
Montana:
Benton Lake.
Bowdoin.
Medicine Lake: All refuge lands in the following subdivisions: T. 30 N., R. 56 E., all; T. 31 N., Rs. 55 and 56 E., all; T. 31 N., R. 57 E., secs. 3–7, inclusive, all; Sec. 8, N½ and SW¼; Sec. 9, W½ NW¼; Sec. 18, N½NE¼, NW¼, N½ SW¼; T. 32 N., Rs. 55, 56, 57, 58 E., all.
Nine-Pipe.
Pablo.
Pishkun.
Willow Creek.
Nebraska:
Crescent Lake: All refuge lands in the following subdivisions: T. 20 N., R. 44 W., secs. 2–7, inclusive, 9, 10, 11, and 18, all; T. 21 N., Rs. 44 and 45 W., all.
North Platte.
Valentine: All refuge lands in the following subdivisions: T. 28 N., R. 27 W., secs. 3–6, inclusive; T. 28 N., R. 28 W., secs. 1 and 12; Ts. 29 and 30 N., Rs. 27, 28, and 29 W., all.
Nevada:
Anaho Island.
Desert Game Refuge: All Range lands in the following subdivisions: Ts. 9–14 S., Rs. 54–62 E., all; T. 15 S., Rs. 56–62 E., all; T. 16 S., Rs. 56, 57, and 58 E., Secs. 1–6, inclusive; Ts. 16 and 17 S., Rs. 59–62 E., inclusive, all; T. 18 S., Rs. 60, 61, and 62 E., all; also all lands above 6,000' elevation in the following area: T. 17 S., Rs. 54 and 55 E.; Ts. 18 and 19 S., Rs. 54, 55, and 56 E.; T. 20 S., Rs. 55, 56, 57, and 58 E.; T. 21 S., Rs. 56, 57, and 58 E.
Sheldon National Antelope Refuge.
Stillwater National Wildlife Management Area.
Stillwater National Wildlife Refuge.
New Jersey:
Brigantine.
Killcohook (see also Delaware).
New Mexico:
Bitter Lake: All of the lands of the refuge west of the Pecos River in the following area: T. 9 S., R. 26 E., secs. 14, 15, 21, 22, 23, 26, 27, 28, 32, 33, 34, and 35; T. 10 S., R. 25 E., secs. 2, 4, 5, 8, 9, 10, 11, 14, 15, 16, 20, 21, 22, 28, and 29.
Bosque del Apache: All refuge lands between the East Side Road and the proposed right-of-way for U. S. Highway No. 85.
New York:
Montezuma.
New York Wildlife Management Area.
Elizabeth Tilton.
Wertheim.
North Carolina:
Mattamuskeet.
Pea Island.
Swanquarter.
North Dakota:
Ardoch.
Arrowwood.
Chase Lake.
Des Lacs.
Lake De.
Kelly's Slough.
Lake Zahl.
Long Lake.
Lostwood.
Lower Souris: All refuge lands north of the line common to Townships 156 and 157 North.
Shade.
Stump Lake.
Tewaukon.
Theodore Roosevelt.
Upper Souris.
Ohio:
Wo[illegible]ster Island.
Oklahoma:
Salt Plains.
Oregon:
Cape Meares.
Cold Springs.
Lower Klamath (see also California).
Malheur.
McKay Creek.
Oregon Islands.
Three Arch Rocks.
Upper Klamath.
Puerto Rico:[1]
Culebra.
South Carolina:
Cape Romain.
Santee.
Savannah (see also Georgia).
South Dakota:
Bear Butte.
Belle Fourche.
Lacreek.
Lake Andes.
Sand Lake.
Waubay.
Tennessee:
Lake Isom.
Reelfoot.
Tennessee.
Texas:
Laguna Atascosa.
Muleshoe.
Utah:
Bear River Migratory Bird Refuge.
Locomotive Springs.
Vermont:
Missisquoi.
Virginia:
Back Bay.
Chincoteague (see also Maryland).
Presquile.
Washington:
Columbia.
Copalis.
Dungeness.
Flattery Rocks.
Jones Island.
Lenore Lake.
Matia Island.
Quillayute Needles.
Smith Island.
Turnbull.
Skagit.
Willapa.
Wisconsin:
Gravel Island.
Green Bay.
Horicon.
Long Tail Point.
Necedah.
Necedah Wildlife Management Area.
Upper Mississippi River Wild Life and Fish Refuge (see also Iowa, Illinois, and Minnesota).
Wyoming:
Hutton Lake.
Pathfinder: All refuge lands in Townships 29 and 30 N., R. 89 W.

[F. R. Doc. 58-9662; Filed, Dec. 9, 1958; 8:48 a. m.]

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[1] The regulations in 43 CFR Part 192 do not apply to Puerto Rico.

APPENDIX B
BLM Suspension Action, March 30, 1956

S.Cha

DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

TELETYPE

March 30, 1956

IDENTICAL TELETYPE TO EACH
ADDRESS ON ATTACHED LIST

THE SUSPENSION TO APRIL 2, 1956, OF DISPOSITION BY LEASE OR OTHERWISE OR THE GRANTING OF ANY USE OF LANDS IN FISH AND WILDLIFE REFUGES, GAME RANGES AND OTHER LANDS UNDER JURISDICTION OF FISH AND WILDLIFE SERVICE IS CONTINUED UNTIL FURTHER NOTICE. THIS DOES NOT SUSPEND ALL PRELIMINARY ACTION WHICH SHOULD CONTINUE TO BE TAKEN. THE SUSPENSION APPLIES ONLY TO PUBLICATIONS IN SOIL MATTERS.

/S/ Edward Woozley
WOOZLEY

Copy to: Eastern States Office
Geological Survey
Donald Chaney, Solicitor's Office
John Farley, Fish and Wildlife Service
BLM Reading File
M Reading File

APPENDIX H

Amendment to Regulations, January 8, 1958 (23 F.R. 227)

TITLE 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

[Circular 1990]

PART 192—OIL AND GAS LEASES

LEASING OF WILDLIFE REFUGE LANDS, GAME RANGE LANDS AND COORDINATION LANDS

Section 192.9 is revised as follows:

§ 192.9 *Leasing of wildlife refuge lands, game range lands and coordination lands*—(a) *Definitions*—(1) *Wildlife refuge lands.* Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the United States Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(2) *Game range lands.* Game ranges created by a withdrawal of public lands and reserved for dual purposes, namely protection and improvement of the public grazing lands and natural forage resources and conservation and development of natural wildlife resources, are under the joint jurisdiction of the Bureau of Land Management and the United States Fish and Wildlife Service.

(3) *Coordination lands.* These lands are withdrawn or acquired by the Government and made available to the States by cooperative agreements entered into between the United States Fish and Wildlife Service and the game commissions of the various States, in accordance with the act of March 10, 1934 (48 Stat. 401), as amended by the act of August 14, 1946 (60 Stat. 1080), or by long-term leases or agreements between the Department of Agriculture and the game commissions of the various States pursuant to the Bankhead-Jones Farm Tenant Act (50 Stat. 525), as amended, where such lands were subsequently transferred to the Department of the Interior, with the United States Fish and Wildlife Service as the custodial agency of the Government.

(4) *Alaska wildlife areas.* Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service.

(b) *Leasing policy and procedure.* (1) No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in subparagraph (2) of this paragraph.

(2) In instances where it is determined by the Geological Survey that any of the lands mentioned in paragraph (a) (1), or any of the lands mentioned in paragraph (a) (2), (3) and (4) of this section and defined in this section as not available for leasing are subject to drainage, the Bureau of Land Management, with the concurrence of the United States Fish and Wildlife Service, will process an offering inviting competitive bids in accordance with the then existing regulations relating to competitive oil and gas leasing. Such leases shall be issued only upon approval by the Secretary of the Interior and shall contain such stipulations as are necessary to assure that leasing activities and drilling shall be carried out in such a manner as will result in a minimum of damage to wildlife resources.

(3) As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior. As to coordination lands, representatives of the Bureau of Land Management and the United States Fish and Wildlife Service will, in cooperation with the authorized members of the various State game commissions, confer for the purpose of determining by agreement those lands which shall not be subject to oil and gas leasing.

(4) The remaining lands in paragraph (a) (2) and (4) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the Fish and Wildlife Service and the Bureau of Land Management. The remaining lands in paragraph (a) (3) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the State Game Commission, the United States Fish and Wildlife Service, and the Bureau of Land Management.

(c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b) (3) of this section shall be published in the FEDERAL REGISTER and shall contain a description of the lands affected thereby which are not subject to oil and gas leasing, together with a statement of the stipulations agreed upon by the parties thereto for inclusion in such leases to assure that all operations under the lease shall be carried out in such a manner as will result in a minimum of damage to wildlife resources. The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management where they may be inspected by the public at the usual hours specified for that purpose. Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.

(d) *Suspension of pending applications.* All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b) (3) of this section shall have been completed.

(e) *Lands in requested withdrawal.* All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the consummation of the withdrawal, and thereafter such offers shall be considered in accordance with the provisions of this section.

(Sec. 32, 41 Stat. 450; 30 U. S. C. 189)

FRED A. SEATON,
Secretary of the Interior.

JANUARY 8, 1958.

[F. R. Doc. 58-374; Filed, Jan. 10, 1958; 8:50 a. m.]

Published in 23 F. R. January 11, 1958

Circular Distribution List

INT.-DUP. SEC., WASH., D.C. 20657

APPENDIX I

Order of Secretary (with map) dated July 24, 1958, published in Federal Register August 2, 1958 (23 F.R. 5883)

DEPARTMENT OF THE INTERIOR

Office of the Secretary

KENAI NATIONAL MOOSE RANGE, ALASKA

AGREEMENT CLASSIFYING LANDS FOR OIL AND GAS LEASING PURPOSES

Notice is hereby given that, pursuant to the regulation 43 CFR, 192 9 (Circular 1990), agreement, as reflected by the map herein referred to, has been consumated between the Bureau of Land Management and the United States Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes. The lands excluded from leasing are specifically delineated on the map of the Kenai National Moose Range, set forth below, which was approved on January 29, 1958, and are identified on said map as follows:

Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:

SEWARD MERIDIAN

Ts. 1, 2, and 3 N., R. 3 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1 and 2 N., R. 4 W. (Unsurveyed)
All.
Ts. 3 and 4 N., R. 4 W. (Unsurveyed)
Portion in Moose Range.
T. 5 N., R. 4 W. (Unsurveyed)
Portion in Moose Range, south of Sterling Highway as relocated.
T. 6 N., R. 4 W. (Unsurveyed)
Northwest corner in Moose Range.
T. 10 N., R. 4 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1, 2, 3, and 4 N., R. 5 W. (Unsurveyed)
All.
T. 5 N., R. 5 W. (Unsurveyed)
Portion in Moose Range south of Sterling Highway as relocated.
T. 9 N., R. 5 W. (Unsurveyed)
Secs. 1 to 5.
T. 10 N., R. 5 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1, 2, 3, and 4 N., R. 6 W. (Unsurveyed)
All.
T. 5 N., R. 6 W. (Unsurveyed)
Portion in Moose Range south of Sterling Highway as relocated.
T. 10 N., R. 6 W. (Unsurveyed)
East range tiers in Moose Range.
Ts. 1, 2, 3, and 4 N., R. 7 W. (Unsurveyed)
All.
T. 5 N., R. 7 W. (Unsurveyed)
Portion in Moose Range, south of Sterling Highway as relocated.
Ts. 1, 2, 3, and 4 N., R. 8 W. (Unsurveyed)
All.
Ts. 1 and 2 N., R. 9 W. (Unsurveyed)
All.
T. 3 N., R. 9 W. (Unsurveyed)
Secs. 31 to 36, incl.
T. 1 N., R. 10 W. (Unsurveyed)
Secs. 1 to 6; Secs. 8 to 16; Secs. 22 to 27; and Secs. 34 to 36.
T. 2 N., R. 10 W. (Unsurveyed)
All.
T. 3 N., R. 10 W. (Unsurveyed)
Secs. 31 to 36, incl.
T. 1 N., R. 11 W. (Unsurveyed)
Secs. 1, 2, and 3.
T. 2 N., R. 11 W. (Partly unsurveyed)
Portion in Moose Range.
T. 3 N., R. 11 W. (Partly unsurveyed)
Secs. 34, 35, and 36; and E½, E½W½ Sec. 33.
Ts. 1 and 2 S., R. 3 W. (Unsurveyed)
Portion in Moose Range.
T. 1 S., R. 4 W. (Unsurveyed)
All.
T. 2 S., R. 4 W. (Unsurveyed)
Portion in Moose Range.
T. 1 S., R. 5 W. (Unsurveyed)
All.
Ts. 1 and 2 S., R. 6 W. (Unsurveyed)
All.
Ts. 3, 4 and 5 S., R. 6 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1, 2, and 3 S., R. 7 W. (Unsurveyed)
All.
Ts. 4 and 5 S., R. 7 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1, 2, and 3 S., R. 8 W. (Unsurveyed)
All.
T. 4 S., R. 8 W. (Unsurveyed)
Portion in Moose Range.
T. 1 S., R. 9 W. (Unsurveyed)
All.
Ts. 2, 3, and 4 S., R. 9 W. (Unsurveyed)
Portion in Moose Range.
T. 1 S., R. 10 W. (Unsurveyed)
Secs. 1 to 4, Secs. 9 to 15, and Secs. 24, 25, and 36.
T. 2 S., R. 10 W. (Unsurveyed)
Secs. 1, 12, 13, 24, 25, and 36.

The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (41 Stat. 437) and the regulations in 43 CFR, Part 192 and the provisions hereof. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192 9 (d) will now be acted upon and adjudicated in accordance with the regulations.

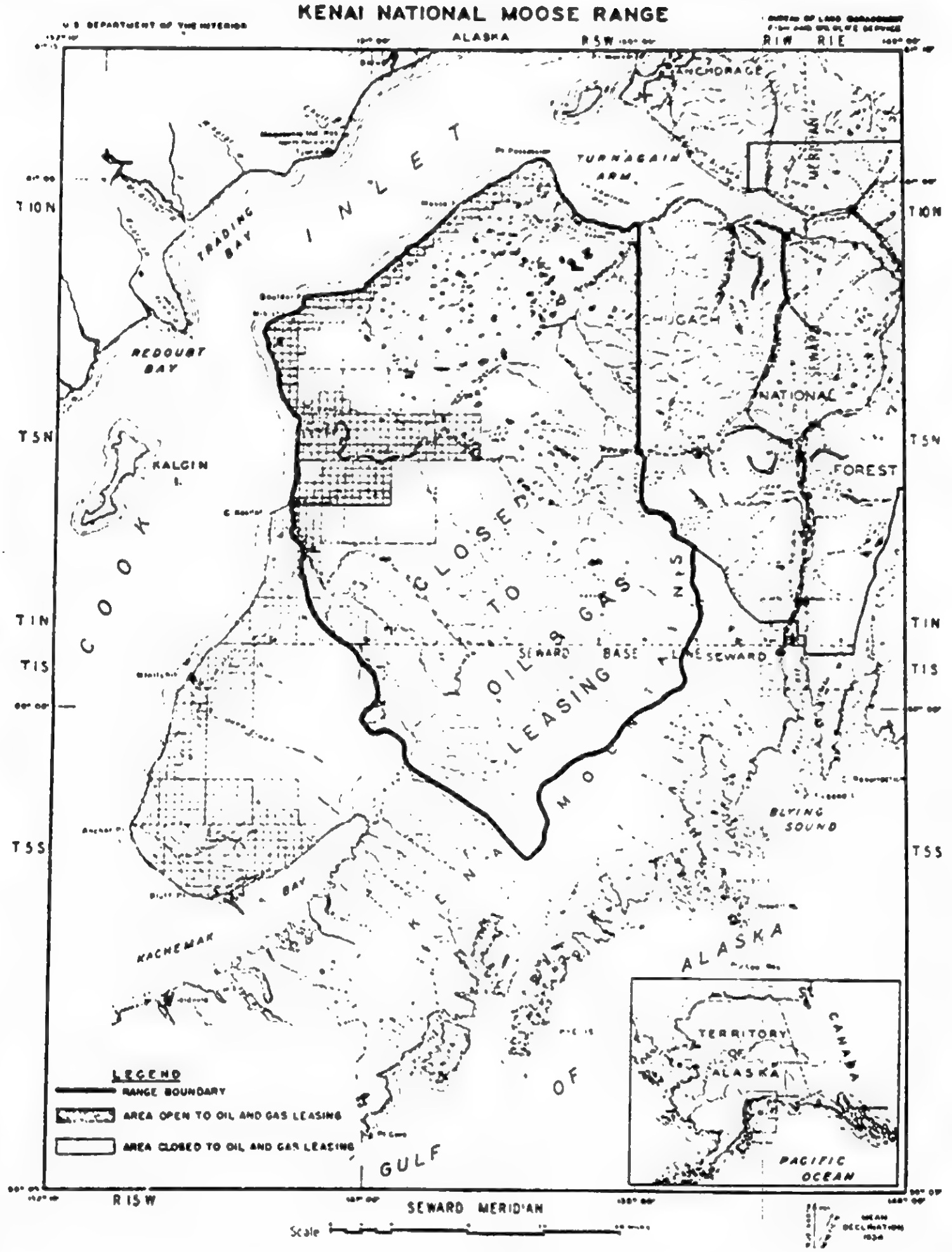
All offers to lease must be submitted on Form 4-1138 and in accordance with the regulation 43 CFR 192 42, accompanied by a $10 filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85-50, enacted July 3, 1958.

In accordance with the regulation 43 CFR 192 9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a. m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295 8.

All leases will be subject to the special stipulations (Form 4-1383) approved April 18, 1958 and published in the FEDERAL REGISTER April 22, 1958 (23 F. R. 2636, 2637).

FRED A. SEATON,
Secretary of the Interior.

JULY 24, 1958.



[F. R. Doc. 58-5811; Filed, July 30, 1958; 12:35 p. m.]

REPLY BRIEF FOR APPELLANTS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ALICE P. TALLMAN, CHRISTINE FLEISCHER, WILLIAM O. RABOURN, HARRY B. COCKRUM, BAILEY E. BELL, JAMES G. CARLSON, MICHAEL F. BEIRNE, JAMES E. O'MALLEY and WALDO E. COYLE,

Appellants,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Charles F. Wheatley, Jr.
Robert L. McCarty
McCarty and Wheatley
1203 Walker Building
Washington 5, D. C.

Attorneys for Appellants

INDEX

TABLE OF CASES

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, et al.,

Appellants,

v.

STEWART L. UDALL, SECRETARY
OF THE INTERIOR,

Appellee.

REPLY BRIEF FOR APPELLANTS

I. LANDS WITHIN THE KENAI MOOSE RANGE WERE CLOSED TO OIL AND GAS LEASE OFFERS PRIOR TO 1958.

The appellee's assertion that the clear language of the 1941 Executive Order creating the Kenai National Moose Range withdrawing the land from "settlement, location, sale, or entry, or other disposition ... under any of the public land laws applicable to Alaska" does not include leasing under the Mineral Leasing Act (which he does not deny is a public land law applicable in Alaska) is plainly wrong.

First, appellee's statement that "[o]bviously, 'settlement, location, sale, or entry' do not include leasing" (Brief, p. 8) is flatly contrary to this Court's holding construing the meaning of those words in Wilbur v. United States ex rel Barton, 60 App. D.C. 217, 46 F.2d 217, 220-221 (1930),

affirmed, United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 quoted in appellants' opening brief at pages 25-26. And in United States v. Midwest Oil Co., 236 U.S. 549 (1915) an Executive Order withdrawing lands "from all forms of location, settlement, selection, entry, or disposal" was upheld as effective to withdraw oil and gas lands (See Appellants' Opening Brief, p. 28). Both the Midwest and Barton cases are landmark decisions regarding the authority of the President to withdraw oil and gas lands for conservation purposes, and it is almost unbelievable that the Deputy Solicitor below sought to construe the 1941 Executive Order creating the Moose Range without reference to these cases.

Second, the appellee improperly relies on the reference in the 1941 Executive Order barring "classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes', 44 Stat. 821, U.S.C., title 48, secs. 360-361" as proof that leasing under the Mineral Leasing Act of 1920 is permissible. The fur leasing act of July 3, 1926 is not one of the general public land laws like the Mineral Leasing Act, which is applicable to all public lands of the United States, but is a particular law applicable only to Alaska. Obviously, the language of the 1941 Executive Order withdrawing the lands "under any of the public land laws applicable to Alaska" refers to the general public land laws. The Secretary's regulations pertaining to "Public Land Laws Applicable to Alaska" confirm this view (See Appellants' Opening Brief, pp. 23-24). Therefore, the obvious purpose for the inclusion of this particular fur leasing act as well as the other particular Alaska law, the Alaska Grazing Act, in with all of the other general public land laws, was to cover the waterfront and bar any type of disposition, leasing or otherwise, of the Range lands.

Conclusive proof that the preceding general language embraces leasing is the specific exception for "fish trap sites." The 1941 order withdrew land from "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public land laws applicable in Alaska" (Appendix A to

Appellants' Opening Brief; emphasis supplied). Fish trap sites are licensed by the Secretary, not deeded. 48 U.S.C. §221; Hynes v. Grimes Packing Co., 337 U.S. 86, 121 (1949). Certainly if the general language of the order, "or other disposition," would include fish trap sites but for the specific exception, a fortiori oil and gas leasing would be embraced therein.

Appellee's argument that the Deputy Solicitor's interpretation of the Executive Order must control is misplaced. The Deputy Solicitor's "interpretation" was admittedly nothing more than a reading of the Executive Order (Appellee's Brief, p. 5) -- a reading not only at odds with the plain meaning of words but in complete disregard of (a) the language of the Pickett Act of 1910 (36 Stat. 847, 43 U.S.C. §141) by which the order was authorized and which it adopted, and (b) the judicial construction by the Supreme Court and this Court of such words as applicable to oil leasing. If the Department is not bound by the judicial construction of acts of Congress, then judicial review is a futile exercise.

Appellee's argument that leasing was perfectly consistent with the purpose of the Moose Range (Appellee's Brief, pp. 9-10) is refuted by the record. If the President in establishing the Range intended only to preclude the alienation of the land, then why did he include the two special Alaska leasing laws for fur farms and grazing? These laws are not less consistent with wildlife preservation than oil and gas leasing. From the time of its creation in 1941 until after the Secretary's order of August 2, 1958 (Appendix I to Appellants' Opening Brief) no leases were in fact granted for lands within the Range. Even then the 1958 order declared the lands in the southern part of the Range as "not opened to oil and gas leasing" because "such activities would be incompatible with management thereof for wildlife purposes."

Appellee's attempt to find an administrative construction of the words used in the 1941 Executive Order is erroneous. The 1921 decision (48 I.D. 459) interpreting the words "or other disposal" in a reservation from "entry, location or other disposal" as limited to things akin to "entries"

or "locations" was inconsistent with the earlier Midwest case, supra and was in substance overruled by the Supreme Court's decision in 1923 in Mason v. United States, 260 U.S. 545, 553-555(1923) (see Appellants' Opening Brief, pp. 26-27). In 1948 the Department itself did not follow the 1921 decision when it rejected lease offers on lands in Alaska withdrawn by Executive Order No. 5214 of October 30, 1929 "from settlement, location, sale or entry." D. Miller, 60 I.D. 161 (1948). Subsequently, however, the Department in the Teuscher case, 62 I.D. 210 (1955) (decided after the conflicting offers in the present case had been filed), reversed the holding of D. Miller re the effect of the language of Executive Order No. 5214. But even the Teuscher case, which made no mention of this Court's authoritative construction of the same words in the 1910 Pickett Act in the Barton case, supra, is not in point. The Executive Order there merely withdrew the lands "from settlement, location, sale or entry." Quite different is the order creating the Kenai Moose Range, which withdrew the land from "settlement, location, sale, or entry, or other disposition (except for fish trap sites)..." Thus, with such language, leasing could be permitted only if expressly authorized by the Order.

II. PROCEDURES SIMILAR TO THOSE SUSTAINED BY THIS COURT IN THE THOR-WESTCLIFFE CASE UNDER WHICH APPELLANTS WERE THE FIRST QUALIFIED APPLICANTS SHOULD CONTROL.

Upon the Secretary's urging, this Court in Thor-Westcliffe Development Co. v. Udall, . . U.S.App.D.C. , 314 F. 2d 257 (1963) upheld regulations for the fair treatment of conflicting applicants for leases. Paradoxically in the in the present case, the Secretary now seeks to challenge the applicability of similar procedures for the fair resolution of priority among appellants and others on the Kenai Moose Range. The appellants having complied with these procedures are entitled to leases as the first applicants. As this Court held in Thor-Westcliffe, the fact that the regulations establishing the procedures are promulgated after lease offers first filed does not relieve those applicants from complying with the procedures subsequently established on an equal basis with other applicants for

the determination of priority. 1/

The appellee seeks to escape compliance with his own procedures by an arbitrary reading of the order of August 2, 1958 (Appendix I to Appellants' Opening Brief), which is patently unfair to appellants. It takes a considerable stretch of the plain language of the August 2, 1958 order to conclude as appellee does that the sentence almost at the end of the order specifying a procedure for the determination "of all offers which conflict in whole or in part" does not refer to pending "offers" as well as new "offers" referred to together without distinction in a preceeding paragraph. (See Appellee's Brief, p. 13.)

But by no stretch of the imagination, even if one takes appellee's first leap, can it be said that the 1954 and 1955 offers were "pending suspended" offers. The suspension order of August 31, 1953 suspended only "pending" oil and gas lease offers as of that date. Appellee in his brief (p. 12) and the Deputy Solicitor below (J. A. 35) while almost conceding this, completely miss the point. The point is not whether after the suspension order of August 31, 1953 the lands were still open to the filing of oil and gas lease offers, but whether even if valid they were entitled to any preferential treatment under the order of August 2, 1958. Under that order, if there were not "pending" "suspended" lease offers, then it is crystal clear that these offers, like those of the appellant in Thor-Westcliffe must be governed by the specified procedure for a public drawing.

Furthermore, appellee's contention that the August 31, 1953 suspension did not close the Range thereafter is diametrically inconsistent

---

1/ The appellee improperly characterizes the issue as one of retroactivity of the new regulation. Here as in Thor-Westcliffe, no leases were issued until after the new regulations had been promulgated.

with his construction of the January 8, 1958 regulation (Appellants' Opening Brief, Exhibit H), by which he admits "the filing of lease offers was precluded" (Appellee's Brief, p. 12; J. A. 37). The January 8, 1958 regulation nowhere says that "Alaska wildlife areas" are closed to oil and gas lease offers. To the contrary, it prescribes a procedure identical to that contemplated in the 1953 suspension order, namely a study by the Department to determine what lands, if any, would be subject to oil and gas leasing (§192.9(b)(3)). Section 192.9(b)(4) then provides that lands "not closed to oil and gas leasing," (not closed to lease offers), will be subject to leasing after agreements have been filed. This is similar to the August 31, 1953 order which suspended action on leasing. From this it is impossible to reconcile appellee's conclusion that the Kenai Range was open to oil and gas lease offers after the August 31, 1953 suspension order, but closed to such offers after the January 8, 1958 regulation. The only reasonable conclusion is that since the language of the 1958 regulation by appellee's admission closed the Range to lease offers as well as leasing until Departmental studies could be completed, then of necessity the August 31, 1953 order must be construed to have the same effect. The Deputy Solicitor's conclusion to the contrary was sheer arbitrary administration prejudicial to appellants.

III. THE EXCEPTION IN PUBLIC LAW 85-805, 30 U.S.C. SEC. 251 DOES NOT APPLY.

Appellee is correct in stating that for the purposes of appellants' Point III, appellants assume that the prior lease offers were suspended. Each of appellants three main points are interdependent of each other, so that a decision in their favor on but one requires a reversal and decree in their favor.

For the purpose of this point, the appellee's contention treated in Point II, is assumed arguendo. But if the Secretary is correct that the 1954 and 1955 offers are "suspended" offers, then they are outside the exception which the legislative history of Public Law 85-805 shows is intended to apply only to

those offers pending on May 5, 1958. The Secretary himself, as pointed out in appellants' opening brief, pp. 40-41, in his correspondence to Congress gave no intimation that the exception was to cover offers on closed lands such as the Kenai Moose Reserve. His specific regulation on opening the Range to which he did not comply was explicit on this:

> "... Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.
>
> All offers to lease must be submitted on Form 4-1158 and in accordance with the regulation 43 CFR 192.42, accompanied by a $10 filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85-505 enacted July 3, 1958."
> (Appellants' Opening Brief, Appendix I; emphasis supplied.)

IV. APPELLEE IMPROPERLY RELIES ON THE STATUTE OF LIMITATIONS

A. Appellee's failure to cross appeal precludes consideration of the matter.

In the court below, the appellee moved to dismiss the complaint on the sole claim that it was barred by the statute of limitations set forth in 30 U.S.C. §226-2 (J.A. 65). Appellants subsequently filed a motion for summary judgment and responded to appellee's motion to dismiss (J.A. 65). Thereafter, appellee filed a motion for summary judgment which challenged appellants' case on the merits and also asserted the statute of limitations claim (J.A 70). The court below denied appellee's motion to dismiss and in granting appellee's motion for summary judgment expressly stated:

> "... that part of the Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations should not form part of the basis for

> the granting of Defendant Udall's motion for summary judgment and accordingly, Defendant Udall's motion to dismiss is denied." (J.A. 73-74.)

Judgment was entered accordingly (J.A. 74). The appellee has taken no appeal from that part of the judgment adverse to him on the statute of limitations issue.

The situation is the same as that in Wisconsin Bankers Association v. Robertson, 111 U.S. App. D.C. 85, 294 F.2d 714, 715 (1961), cert. denied, 268 U.S. 938. There, this Court, in a unanimous decision by Chief Judge Miller, joined by Judges Bazelon and Burger[2/] held that the appellee Federal Home Loan Bank Board could not challenge the appellants standing to sue in the District Court in the absence of a cross appeal from the District Court's decision for appellants on this issue. The judgment in the District Court having been for the appellee Board on the merits, this Court ruled "[i]n the absence of a cross appeal, an 'appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary ...'"

The same result was reached in Peoria & Pekin Union Ry. Co. v. United States, 263 U.S. 528, 535-536 (1924). There the Supreme Court, in an opinion by Mr. Justice Brandeis, held that the United States, in the absence of a cross appeal, was barred on appeal from raising the issue of lack of proper venue which had been denied by the District Court in rendering judgment for the United States on the merits. Subsequently, Justice Brandeis explained the case by stating:

> "...An objection to venue can be waived at any stage of the proceeding. This court held that it was waived by failure to take a cross appeal." (United States v. American Ry. Express Co., 265 U.S. 425, 436, note 11 (1924).)

By the same token, a statute of limitation may be waived, Bush v. Remington Rand, 213 F.2d 456, 465 (2nd Cir. 1954), cert. denied 348 U.S. 861, and appellee's failure to cross appeal constitutes such a waiver.

2/ Judge Burger concurred on other grounds.

B. The statute of limitations does not run until available administrative remedies for reconsideration have been exhausted.

The District Court below was clearly correct in denying applicability of the statute of limitations, because appellants had not exhausted their available administrative remedies before the Secretary. Subsequent to the opinion by the Deputy Solicitor (J.A. 32) the appellants duly filed their petition for exercise of supervisory authority requesting reconsideration on three grounds: (1) that newly discovered evidence substantiates the express language of the Executive Order that it was the intent of President Roosevelt in establishing the Kenai National Moose Reserve by Executive Order that it be closed to oil and gas leasing under the Mineral Leasing Act; (2) that the Deputy Solicitor lacked authority to reject appellants' appeals to the Secretary; and (3) that the Deputy Solicitor's opinion conflicts with other decisions within the Department (J.A. 40-62). In a decision dated April 25, 1962, appellants' petition for exercise of supervisory authority, although considered on its merits, was denied. Appellants filed their present action on June 8, 1962(J.A. 1).

A statute limiting the time for commencing review does not commence to run until after the agency has acted on a petition for reconsideration. Montship Lines, Limited, v. Federal Maritime Board, 295 F.2d 147, 151 (1961); Outland v. CAB, 109 U.S. App. D.C. 90, 284 F.2d 224, 227-228 (1960); Braniff Airways v. CAB, 79 U.S. App. D.C. 341, 147 F.2d 152 (1945); Samuel B. Franklin & Co. v. CAB 290 F.2d 719 (9th Cir. 1961), cert. denied 368 U.S. 889; cf. CAB v. Delta Air Lines, 367 U.S. 316, 325-327 (1961); Black River Valley Broadcasts v. McNinch, Inc. 69 App. D.C. 311, 101 F.2d 235 (1938), cert. denied, 307 U.S. 623. [3/] In Outland, this Court ruled:

3/ Nothing in Cities Service Gas Co. v. FPC, 255 F.2d 860, cert. denied 358 U.S. 836, cited by appellee, supports his contention because there, under the Natural Gas Act, a petition for rehearing is required as a jurisdictional prerequisite to judicial review, but even there the time for review begins to run only after the agency acts on the petition, even though the original order meets all the requisites of "finality."

> "... Section 1009(c) [5 U.S.C., Administrative Procedure Act] does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon. ..."

A petition to the Secretary for the exercise of his supervisoty authority is a long-standing procedure within the Department dating back to the Nineteenth Century. The purpose of such petitions is to have the Secretary reconsider his own prior decisions, or to consider decisions of subordinates, which but for the petition would be final, on the ground that such decisions were erroneous in law or fact. A few of the more recent of such cases are collected in the footnote. 4/

4/ B. E. Burnaugh, 67 I.D. 366 (1960) (reconsideration of decision by deputy solicitor on ground of a change in the law by judicial decision); H. T. Birr, III et al., A-27947 (Supp.) (August 26, 1960) (motion for reconsideration of decision by Assistant Secretary on the ground of changed conditions) Gabbs Exploration Co., A-28213 (Supp.) (July 11, 1960) (petition for reconsideration of the departmental decision on various grounds, including failure to consider relevant statute); The Dredge Corporation, 65 I.D. 336 (1958) (reconsideration of decision by deputy solicitor on ground that it was in violation of Administrative Procedure Act); Eleanor C. Beritzhoff, et al., A-27612, A-27622, A-27636, A-27715 (August 6, 1958) (Secretary exercises supervisory authority to defer action on pending appeals re Alaska oil and gas leases pending enactment of legislation); State of Louisiana, Department of Army and Shell Oil Co., Protestants, A-27345 (August 28, 1957), (Departmental decision of March 4, 1957 vacated and the matter reopened for the reception of additional evidence); Tolan-Dowse Controversy (Montana 0718), 61 I.D. 20, 24 (1952) (supervisory authority correcting errors of Director of Bureau of Land Management even in absence of appeal to Secretary); United States v. M. W. Mouat, et al., 61 I.D. 289 (1954) (reconsideration and modification of former decision by Secretary on grounds of newly discovered evidence and errors of law); United States v. U.S. Borax Co., 58 I.D. 426, 431 (1944); H. W. Rowley, 58 I.D. 550, 556 (1943); United States v. Frank Herval, 57 I.D. 183 (1940) (Department may grant motion for rehearing if new evidence or new errors of law alleged); United States v. California, 55 I.D. 532, 535, 543-546 (1936) (reconsideration of prior findings of facts

These long-standing procedures for the exercise of supervisory powers by the Secretary to correct erroneous decisions within the Department or to consider new evidence, etc. have been recognized in Part 221 of the Regulations governing practice within the Department:

> "43 CFR §221.107 Power of Secretary. Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law."

This carried forward the similar provision of the 1954 regulations:

> "Supervisory Power of the Secretary"
>
> "§221.78 Power of Secretary. In proceedings before the Secretary of the Interior, the same rules shall govern, insofar as applicable, as are provided for proceedings before the Director of the Bureau of Land Management, but no rule of practice shall be construed to deprive the Secretary of any power conferred upon him by law."
> (43 CFR 1954 ed.)

The supervisory power of the Secretary of Interior at law to reconsider departmental decisions regarding matters as here still within the jurisdiction of the Department has been long recognized by the Supreme Court. West v. Standard Oil Co., 278 U.S. 200, 210-213 (1929); Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 216-217 (1930); Lane v. United States ex rel. Mickadiet, 241 U.S. 201, 208-209 (1916) (reconsideration on grounds of newly discovery evidence); Michigan Land & Lumber Co. v. Rust, 168 U.S. 589, 593-595 (1897); New Orleans v. Paine, 147 U.S. 261 (1893); Knight v. United Land Association, 142 U.S. 161, 177-178 (1891).

4/ (Footnote continued from page 10)
and conclusions of law based on new evidence); State of California et al., 51 L.D. 141, 144 (1925) (Secretary may reconsider prior departmental decision if erroneous, unlawful or unjust); cf. Charles W. Barnhart, A-28518 (November 16, 1960) (correction of error of Director of Bureau of Land Management in failing to dismiss appeal); United States v. Thomas R. Shuck, et al. A-27965 (February 2, 1960) (exercise by Secretary of supervisory authority to consider new evidence without remanding to Director of Bureau of Land Management); Joe Lyons, A-27824 (January 14, 1959) (dictum that Secretary's supervisory authority permits him to correct erroneous decisions even in the absence of appeal.

Counsel for appellee's contention that appellants' petition to the Secretary was untimely is completely unfounded. In State of Louisiana, Department of Army and Shell Oil Co., Protestants, A-27345 (August 28, 1957) a petition for reconsideration on the basis of newly discovered evidence filed four and one half months after the Departmental decision was granted. Other cases cited in note 4, pages 10 and 11, supra, involved petitions after similar periods. Conclusive here, however, is the fact that the Department in the present case did not hold appellants' petition to be untimely but on the contrary adjudicated it on its merits (J.A. 63). Certainly appellants were entitled to rely on the established Departmental practice to which the Department itself adhered in the present case and exhaust this available administrative remedy before seeking review. As this Court said in Outland, supra, "there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary ...." (109 U.S. App. D.C. at 93, 284 F. 2d at 227). Had appellee properly corrected the Deputy Solicitor's errors laid bare by appellants' petition for reconsideration, this review proceeding would have been unnecessary.

C. The Deputy Solicitor lacked authority to decide appellants' appeals.

Plaintiffs submit that the authorities discussed supra, under B, pp. 9 - 11, which assume arguendo that the Deputy Solicitor had authority to act for the Secretary, are completely dispositive of appellee's statute of limitation contention. However, that contention is defective for another completely different reason.

The purported decision by the Deputy Solicitor of appellants' appeals to the Secretary of the Interior states that it was authorized as follows:

> "Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed." (J.A. 39.)

However, this order delegating authority expressly denies the grant of any authority to the Solicitor or Deputy Solicitor to modify existing withdrawals of public lands:

"200.2.1 General limitations.

"A. Nothing in this Delegation Series empowers any officer or employee of the Department to exercise authority which the Secretary may not redelegate ...

"B. In certain instances, the provisions of a delegation of authority to the Secretary confine redelegation to specified officers. In those cases there is a redelegation of authority in this Delegation Series only if the authority is expressly mentioned. For example ...the authority under Executive Order 10355, to withdraw or reserve certain lands, which may be redelegated only to the Under Secretary and the Assistant Secretaries, is expressly mentioned in 210.1.1 and 1.2." (24 F.R. 1348)

Under Executive Order 10355, only the Secretary of the Interior or an Under Secretary or Assistant Secretary may "modify or revoke withdrawals and reservations of [public] lands heretofore or hereafter made." (Executive Order No. 10355 of May 26, 1953, 17 F.R. 4831.)

The lands involved in the present case are located within the Kenai National Moose Range created by Executive Order No. 8979 (6 F.R. 6471) on December 16, 1941. If plaintiffs are right on the merits of this case that this 1941 withdrawal by President Roosevelt closed the Range to oil and gas leasing under the Mineral Leasing Act until it was validly opened thereto by the order of the Secretary of the Interior of August 2, 1958 (Appendix I to Appellants' Opening Brief) (pursuant to which they filed their offers), then a fortiori the deputy solicitor had no authority to reject their appeals on the ground that the Range was open to oil and gas lease offers in 1954 and 1955. The purported decision by the deputy solicitor retroactively opening the Range by approving the issuance of these 1954 and 1955 leases was unauthorized because the Secretary has not delegated his authority under Executive Order 10355 to modify or revoke the Kenai Moose Range withdrawal to the Deputy Solicitor. On this premise, clearly the Deputy Solicitor's decision opening the Range was beyond his delegated authority with the consequence that there was no valid final decision on the Secretarial level of plaintiffs' appeals.

Certainly appellants faced with this conclusion were obligated to first bring this matter to the attention of the Secretary by means of the available petition for exercise of supervisory authority before challenging the authority of the Deputy Solicitor in the Courts. Cf. United States v. Morton Salt Co., 338 U.S. 632, 653(1950).

CONCLUSION

For these reasons, together with those contained in their opening brief, appellants respectfully submit that the denial by the Court below of their motion for summary judgment was erroneous and that as a matter of law summary judgment should have been granted for appellants.

Respectfully submitted,

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April 30, 1963

CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the foregoing reply brief on counsel for the appellee, Edmund Clark, Attorney, Justice Department, Washington 25, D. C. by mail, postage prepaid, this 30th day of April, 1963.

CHARLES F. WHEATLEY, JR.

Charles F. Wheatley, Jr.

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ALICE P. TALLMAN, CHRISTINE FLEISCHER, WILLIAM O. RABOURN, HARRY B. COCKRUM, BAILEY E. BELL, JAMES G. CARLSON, MICHAEL F. BEIRNE, JAMES E. O'MALLEY and WALDO E. COYLE,
APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
APPELLEE

Appeal from the United States District Court for the District of Columbia

---

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Assistant Attorney General.

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QUESTIONS PRESENTED

1. Whether a withdrawal of public land as a wildlife reserve removes the land from the operation of the Mineral Leasing Act.

2. Whether a regulation suspending "final action" on offers to lease for oil and gas purposes prohibits the valid filing of such offers.

3. Whether an exception in a statute for "pending" offers includes offers upon which final action is suspended by regulation.

4. Whether this action is barred by the 90-day statute of limitations applicable to judicial review of decisions of the Secretary of the Interior relative to oil and gas leases.

INDEX

CITATIONS

Cases:

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OPINION BELOW

The district court did not write a formal opinion; however, a memorandum was filed by the court on October 16, 1962 (Jt. App. 73-74).

JURISDICTION

The jurisdiction of the district court was invoked under Title 11, Section 306, District of Columbia Code; 5 U.S.C.

sec. 1009; and 28 U.S.C. secs. 2201 and 2202. Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

STATEMENT

This is an appeal from a summary judgment in favor of the Secretary of the Interior in an action to review his decision rejecting appellants' applications for oil and gas leases on certain land within the Kenai National Moose Reserve on the Kenai Peninsula in Alaska. The relevant facts may be summarized in chronological order as follows:

The Moose Reserve was established December 16, 1941, by Executive Order No. 8979 (6 Fed. Reg. 6471, Appendix A of appellants' brief), which had been prepared by the Department of the Interior (Jt. App. 61-62). That order, covering all but a small portion of the subject lands, withdrew and reserved the area for moose and provided that none of the lands:

> • • • shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: • • •.

The remaining portion of the subject lands was included within Public Land Order No. 487 of June 16, 1948 (13 C.F.R. 3462, Appendix B of appellants' brief), providing that those lands:

> • • • are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation.

On August 31, 1953, the Director of the Bureau of Land Management issued a memorandum to the Regional Administrators of the interested regions, advising that the Department was conducting a study relating to possible changes of policy and regulations in the issuance of oil and gas leases within wildlife refuges on the public domain and acquired lands. The memorandum directed the regions to "suspend action on all pending oil and gas lease offers and applications for lands within such refuges" pending completion of the study (Appendix C of appellants' brief).

Between October 15, 1954, and January 28, 1955, certain individuals, not parties to this litigation, filed applications for oil and gas leases on the lands here involved (Jt. App. 33). These are the individuals who were ultimately awarded leases on the lands in question.

On September 9, 1955, Public Land Order No. 487 was revoked by Public Land Order No. 1212 (20 Fed. Reg. 6795, Appendix D of appellants' brief). The latter order opened the lands covered for acquisition under certain homestead laws and appeared to delay the effective filing dates of subsequent applications under the mineral leasing laws. However, the language referring to mineral leasing laws was deleted by an amendment to the order dated October 14, 1955 (20 Fed. Reg. 7904, Appendix E of appellants' brief).

On December 8, 1955, regulations relating to leasing for oil and gas purposes on lands set aside for wildlife protection (43 C.F.R. 192.9) were amended to specify certain lands (not here involved) as "not available for leasing" and providing: "Oil and gas leases may be issued for other lands" (20 Fed. Reg. 9009, Appendix F of appellants' brief).

On March 30, 1956, the suspension of final action on lease applications was reimposed by Bureau of Land Management directive (Appendix G of appellants' brief).

On January 8, 1958, the Secretary amended 43 C.F.R. 192.9, defining "Alaska Wildlife Areas," to include "areas in Alaska created by a withdrawal of public lands for the

management of natural resources and administered by the United States Fish and Wildlife Service." The regulation provided that the Bureau of Land Management and the United States Fish and Wildlife Service "will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing" and that "lease offers for such lands [Wildlife Areas] will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records." Finally, the regulation provided that "all pending offers or applications for oil and gas covering * * * Alaska wildlife areas, will continue to be suspended" until the Secretary of the Interior approved the agreement between the Fish and Wildlife Service and the Bureau of Land Management referred to above.

The agreement between Fish and Wildlife and the Bureau of Land Management was concluded and approved by the Secretary of the Interior, and notice thereof was published on August 2, 1958, designating the land in the Moose Reserve which was not subject to oil and gas leasing (23 Fed. Reg. 5882, Appendix I of appellants' brief). The notice provided that the balance of the lands would be subject to the filing of oil and gas lease offers and that "Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 C.F.R. 192.9(d) will now be acted upon and adjudicated in accordance with the regulations." In a separate paragraph, the notice provided that offers must be "accompanied by a $10 filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85-505 enacted July 3, 1958" (30 U.S.C. sec. 251).[1] The notice finally provided that all lease offers filed within 10 days after the date established by the January 8, 1958, regulation as the date they would be accepted for filing would be treated as simultaneously filed and that

[1] This act excepted "offers * * * filed prior to * * * and pending on May 3, 1958."

"The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedures outlined in the regulation 43 C.F.R. 295.8" (the drawing).

The agreement and maps were noted on the Anchorage land office records on August 4, 1958, and appellants' offers to lease were filed within 10 days thereafter (Jt. App. 38).

On September 1, 1958, oil and gas leases covering the lands in question were issued to the parties, previously referred to, whose applications were filed in 1954 and 1955. Accordingly, appellants' offers were rejected by the local land office and the rejection was affirmed by the Bureau of Land Management (Jt. App. 30-31) and by the Secretary of the Interior, acting through the Deputy Solicitor, on September 1, 1961 (Jt. App. 33-39).

The basis of the Secretary's decision was simply that the 1941 withdrawal order "did not have the effect of removing the lands therein from the operation of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*). This is so because nothing in the withdrawal specifically excludes the lands from the scope of the act." (Jt. App. 34.) The Secretary also concluded that, although *issuance* of oil and gas leases had been suspended since 1953, the applications filed in 1954 and 1955 were properly filed and, hence, pending in 1958 when the regulations were issued specifying which land could be leased and which could not be and further providing that offers to lease "which have been pending and upon which action was suspended in accordance with the regulation 43 C.F.R. 192.9(d) will now be acted upon and adjudicated in accordance with the regulations." The Secretary further concluded that the offers were "pending" on May 3, 1958, within the meaning of the exception of 30 U.S.C. sec. 251. The leases were properly issued to the prior applicants at 25 cents per acre for the first year of the leases (Jt. App. 39).

On February 15, 1962, appellants petitioned the Secretary of the Interior for exercise of his supervisory au-

thority (Jt. App. 41-60). This petition was denied on April 25, 1962 (Jt. App. 63). Thereafter, appellants instituted this action on June 8, 1962, to compel the Secretary to issue oil and gas leases to them (Jt. App. 1-11). The Secretary filed a motion for summary judgment based on the merits and also on the 90-day statute of limitations contained in 30 U.S.C. sec. 226-2 (*infra*, p. 70). The district court granted the Secretary of the Interior's motion for summary judgment. However, it pointed out in a memorandum (Jt. App. 73-74) that "that part of Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations should not form a part of the basis for the granting of Defendant Udall's motion for summary judgment and, accordingly, Defendant Udall's motion to dismiss is denied." Judgment was entered on November 1, 1962 (Jt. App. 74). This appeal followed (Jt. App. 75).

SUMMARY OF ARGUMENT

I

A. The Executive Order of December 16, 1941, withdrawing this land from "settlement, location, sale, or entry, or other disposition * * * under any of the public-land laws applicable to Alaska" did not remove the land from the scope of the Mineral Leasing Act. This is plain from the immediately following portion of the order specifically excluding "classification and lease under the provisions of the Act of July 3, 1926." The latter Act is a public-land law applicable to Alaska and, if leasing had been covered, as distinguished from complete alienation of title, there would have been no need for that specific language.

It has long been the practice of the Department of the Interior to interpret language such as that in the 1941 order as not removing the land from the scope of the Mineral Leasing Act. This interpretation is reasonable and may not be upset.

B. Since the land was subject to leasing for oil and gas purposes, a regulation of the Secretary of the Interior suspending *final action* on pending offers did not have the effect of prohibiting the filing of offers, and all offers filed during the suspension period were pending at the time the suspension was lifted. Accordingly, those offers were entitled to the priority specified in the regulation lifting the suspension, and leases were properly issued to such offerors.

C. 30 U.S.C. sec. 251 removed the preferential rental enjoyed by oil and gas lessees on Alaska land. The Act excepted from its operation leases issued pursuant to offers filed prior to and pending on May 3, 1958. The leases in the instant case were issued pursuant to offers filed prior to that date. Although final action on the offers had been suspended by regulation, they were nonetheless valid pending offers at that time.

II

30 U.S.C. sec. 226-2 clearly prohibits this action since it was not commenced until long after the 90-day period after the final decision of the Secretary provided by that statute. The statutory period was not tolled by the petition for exercise of the Secretary's supervisory authority filed by appellants for two reasons: First, there is no provision, statutory or regulatory, for such a petition. Second, even if such petition were provided for, appellants did not file it until long after the period for judicial review had expired. Consequently, there was no time left to be tolled.

ARGUMENT

I

The Secretary of the Interior Properly Rejected Appellants' Offers To Lease for Oil and Gas Purposes

At the time appellants filed their offers to lease the subject land for oil and gas purposes, there were already pending, as will be shown, prior valid offers to lease the same land. Accordingly, when leases were issued on the basis of the prior pending offers, appellants' offers were properly rejected.

A. *The subject lands within the Kenai Moose Reserve were open to the filing of offers to lease under the Mineral Leasing Act, 30 U.S.C. secs. 181 et seq., when the prior offers were filed.*—The order of December 16, 1941, creating the Moose Reserve, did not remove the land, as appellants contend (Br. 22-31), from the scope of the Mineral Leasing Act. The land, under the terms of the order, was not subject to "settlement, location, sale, or entry, or other disposition * * * under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926 * * *."

The order did not contemplate removing the land from the applicability of the Mineral Leasing Act. Obviously, "settlement, location, sale, or entry" do not include leasing. Nor does the phrase "or other disposition * * * under any of the public-land laws applicable to Alaska." Were leasing, as distinguished from disposing of the entire federal interest, prohibited by that general language, there would have been no need to specifically prohibit leasing under the Act of July 3, 1926, 44 Stat. 821, 48 U.S.C. secs. 360-361. For that Act is unquestionably one of the "public-land laws applicable to Alaska." Plainly, the framers of the order contemplated that the order of withdrawal should preclude only such action with respect to the lands as would result in an alienation of the United States' title. Clearly, the issuance of a lease pursuant

to the Mineral Leasing Act (or any other Act) does not alienate the title of the United States, or even remove the land from the public domain for all purposes.

In the face of the plain language and clearly expressed intent of the withdrawal order, there is little need to resort to other support for the Secretary's interpretation of the order. However, it should be noted that the Secretary was interpreting the scope of an order relating to the management and operation of his own Department. Indeed, the order had been drafted by the Department of the Interior (Statement, *supra*, p. 2). Thus, the situation may be likened to a construction of his own regulation, and it is well-established that such a construction will be sustained unless it is clearly unreasonable. *Wright* v. *Paine*, 110 U.S.App.D.C. 100, 102, 289 F.2d 766, 768 (1961); *Safarik* v. *Udall*, 113 U.S. App.D.C. 68, 304 F.2d 944 (1962), cert. den., 371 U.S. 901. But even if the Executive Order be regarded in a different light because it emanated from the office of the President rather than from one of the Departments, its interpretation can be governed by no stricter rules than those applicable to his construction of an Act of Congress. Here too, the result is the same—the interpretation need only be reasonable. *Labor Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946); *Rochester Telephone* v. *United States*, 307 U.S. 125 (1939); *Gray* v. *Powell*, 314 U.S. 402 (1941); *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194 (1947); *California Company* v. *Udall*, 111 U.S. App.D.C. 262, 296 F.2d 384 (1962); *Morgan* v. *Udall*, 113 U.S.App.D.C. 192, 306 F.2d 799 (1962), cert. den., 371 U.S. 941.

Certainly, the interpretation of the Secretary of the Interior here is a reasonable one. A withdrawal for purposes of establishing a wildlife reserve is clearly incompatible with permitting the land to be alienated and placed beyond the control of the United States. This might well defeat the purpose of the withdrawal—the protection of wildlife. However, a withdrawal for such purposes is

not necessarily incompatible with the development of the petroleum resources under proper regulation where the basic control is retained by the United States. And such is the case here, as can be seen in the regulations with respect to oil and gas development within the Moose Reserve. For example, see 43 C.F.R. 192.9 (Appendix F of appellants' brief), where it is provided that when "the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service." Accordingly, to limit the phrase "or other disposition" and, hence, applicability of the withdrawal to situations where the United States gives up all control over the land, was entirely reasonable. Certainly the interpretation of the Secretary cannot, by any stretch of imagination, be characterized as "unreasonable, arbitrary or capricious" and, hence, may not be overturned. *Pressentin* v. *Seaton*, 109 U.S.App.D.C. 61, 284 F.2d 195, 198 (1960).

It should also be noted that this interpretation of the scope of the withdrawal is consistent with prior interpretation by the Department of the Interior of withdrawals couched in similar language as far back as 1921 when the Department of the Interior held that a reservation of lands of the United States from entry, location or other disposal under the laws of the United States did not remove the reserved lands from the operation of the Mineral Leasing Act (48 I.D. 459). For a recent application of the same principle see *Noel Teuscher et al.*, 62 I.D. 210 (1955). Certainly, the long-established practice of the Department charged with the administration of such orders is entitled to great weight. *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915), and, as stated in *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315 (1933), "administrative practice, consistent and generally unchallenged, will not be overturned

except for very cogent reasons if the scope of the command is indefinite and doubtful." [2]

Appellants seek consolation in the fact that the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. sec. 141, authorizing withdrawals such as that creating the Moose Reserve, is couched in language similar to that in the subject order. They point out that the Pickett Act has been construed to authorize withdrawing land from the scope of the Mineral Leasing Act. From this they leap to the conclusion that the Secretary's interpretation of the withdrawal order cannot stand. It is enough to say that we are not here dealing with whether the President *might have* lawfully withdrawn the land from the scope of the Mineral Leasing Act but whether the President *did* withdraw this land from operation of the Act. No one would contend that the President must exercise his entire authority if he chooses not to. And, as has been shown, the order is plain that he did not intend to preclude leasing, except for the purpose specified.

The decisions cited by appellants are inapposite in that all save one deal with the question of whether the withdrawal was authorized and there was no question of interpreting the order itself. Thus, in *Bordieu* v. *Pacific Oil Co.*, 299 U.S. 65 (1936), and *Wilbur* v. *United States*, 60 App.D.C. 11, 46 F.2d 217 (1930), aff'd. 283 U.S. 414, both subsequent to the Mineral Leasing Act, the withdrawal orders on their faces demonstrated that leases (prospecting permits) for oil and gas under the Mineral Leasing Act were precluded. *Mason* v. *United States*, 260 U.S. 545 (1923), the only case construing a withdrawal order, and *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915), both prior to the Mineral Leasing Act, were dealing with the situation where petroleum was obtained from public land under the mining laws, whereby

[2] It should be noted that, with respect to oil and gas leasing on this very reserve, in *Ducsing* v. *Udall* (No. 17,358), now pending before this Court, some 50 applicants, as well as the Secretary, have assumed that land included within the 1941 withdrawal has at all times since been open for the filing of lease offers.

the applicant could obtain fee title to the land, thus divesting the United States of all control.

B. *The leases, which were the basis of rejecting appellants' applications, were properly issued to the first qualified applicants.*—These leases were issued in September 1958 pursuant to offers filed in 1954 and 1955. Appellants' applications were filed in 1958. Consequently, there is no question of priority in time. As has already been shown, *supra*, pp. 8-11, nothing in the Executive Order creating the Moose Reserve prevented the filing of applications for, or the issuance of oil and gas leases on lands within the reserve. It is equally clear that the order of 1953, suspending *final action* on pending applications, and the subsequent order in 1956, reimposing the suspension (after a short period, not here relevant, when action could have been taken and leases issued), neither specifically nor by implication prevented the filing of applications.

Appellants' semantic argument (Br. 33-35) that the only offers upon which action was suspended by the 1953 and subsequent orders were those that were pending on the date of the 1953 order would, even if acceptable, avail them nothing. For that would only demonstrate that the leases based on the 1954 and 1955 offers could have been issued at any time, including the actual time of issue. In any event, such a narrow construction of the order is not warranted and the broader construction given by the Secretary is reasonable and not to be overturned. *Wright* v. *Paine*, 110 U.S.App.D.C. 100, 102, 289 F.2d 766, 768 (1961); *Safarik* v. *Udall*, 113 U.S. App.D.C. 68, 304 F.2d 944 (1962), cert. den., 371 U.S. 901; *Pressentin* v. *Seaton*, 109 U.S.App.D.C. 61, 64, 284 F.2d 195, 198 (1960).

It was not until the January 8, 1958, regulation that the filing of lease offers was precluded—and even then it was only a technical prohibition. Thus, that regulation defined "Alaska Wildlife Areas" and provided that "lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps

or plats are noted on the land office records." The agreements and maps referred to were those delineating the areas to be leased and those not to be leased (Statement, *supra*, p. 4).

Notice of the agreements and maps was published August 2, 1958. That notice first provided for final action and adjudication of pending offers upon which action had been suspended. It went on to provide in a separate paragraph that all offers filed pursuant to the January 8, 1958, regulation within 10 days after the effective date for acceptance of offers specified in that regulation "will be treated as having been filed simultaneously." The last sentence of this paragraph provides, "The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 C.F.R. 295.8" (a drawing).

It is the last sentence upon which appellants rely. They urge (Br. 33) that it includes the pending and suspended offers, as well as those filed pursuant and subsequent to the 1958 regulation. Such a construction cannot be accepted. It would render meaningless the clear direction contained earlier in the same notice to proceed to final action and adjudication of those pending offers. Quite reasonably the Secretary limited the sentence to the paragraph of which it was a part and, hence, to the offers described in that paragraph, thus giving effect to the earlier direction to adjudicate pending offers. While it is not impossible that the Secretary could have drawn the regulation to have retroactive effect (*Thor-Westcliffe Development, Inc.* v. *Udall*, —— U.S.App.D.C. ——, 314 F.2d 257 (1963)), he did not in fact do so. Again, the Secretary's decision is reasonable, particularly in the light of the background of the oil and gas regulations pertaining to the Kenai Penninsula.

C. *The leases issued were clearly within the exception specified in Public Law 85-805, 30 U.S.C. sec. 251*—That Act removed the preference in rental payments enjoyed by lessees of Alaskan oil and gas leases. It contained a specific exception as to "leases which may issue pursuant

to applications or offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958." The offers upon which the leases in question were issued were concededly filed prior to May 3, 1958.

As we have already shown, *supra*, pp. 8-11, the offers were filed on land open to application. The offers had not been rejected. Therefore, they must have been pending on May 3, 1958. Again, appellants offer a semantic argument. Thus, they urge (Br. 39-40) that action on the offers was suspended and they cannot be considered as pending because "pending" in 30 U.S.C. sec. 251 refers, they say, only to offers which "had not been acted on due to administrative lag in processing applications, and for no other reasons." It is interesting to note that, while appellants insist for this argument that action on the offers was suspended, they had previously urged under Point II that action on the same offers was not suspended. Appellants offer no explanation for this inconsistency. Nor do they offer any support for their strained construction of the statute. Thus, it is apparent that appellants' interpretation must fail for want of consistency, if nothing else. The statement of Representative Saylor (Br. 41), quite apart from not purporting to express the intent of Congress, simply will not support the inference sought to be drawn by appellants from the words of the statute. In fact, the meaning of the statute is set forth very succinctly by Representative Saylor in the omitted portion of his statement at 104 Cong. Rec. 12,258 as follows:

> The inclusion of a cutoff date in the legislation means, simply, this: Those who filed applications and had them pending prior to that date, will pay the rental of 25 cents per acre operative prior to the suspension of leasing: those who file thereafter will pay 50 cents for the first year rental.

II

The Action Is Barred By the 90-Day Limitation In 30 U.S.C. Sec. 226-2

30 U.S.C. sec. 226-2 provides, insofar as is relevant:

> No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter. * * *

The final and reviewable decision of the Secretary of the Interior affirming the rejection of appellants' offers to lease was rendered September 1, 1961 (Statement, *supra*, p. 5). The present action was not commenced until June 8, 1962, more than five months after the decision (Statement, *supra*, p. 6). The statute was pleaded as a defense to the action (Statement, *supra*, p. 6). Accordingly, the action could properly have been dismissed on the grounds that it was barred by the statute of limitations. Despite the fact that the district court specifically declined to pass on the question, this Court can properly dispose of the case on the basis of limitations now. *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924).

Filing a petition with the Secretary for the exercise of supervisory authority did not toll the running of the 90-day period. The decision of the Secretary on September 1, 1961, was final and reviewable on that date as it clearly denied an alleged right. *Cities Service Gas Company* v. *Federal Power Commission*, 255 F.2d 860 (C.A. 10, 1958), cert. den., 358 U.S. 837. It is only where the rules of practice of an administrative agency provide for a petition for rehearing or reconsideration and when one is timely filed that the time for seeking judicial review is tolled. *Black River Valley Broadcast* v. *McNinch*, 69 App.D.C. 311, 101 F.2d 235 (1938), cert. den., 307 U.S. 623.

There is no provision by statute or regulation permitting, much less giving, a right to file a petition for re-

consideration. It is, of course, true that the Secretary in his discretion may reconsider or reopen his own decision with respect to public land so long as the land remains within his jurisdiction. *United States* v. *United States Borax Co.*, 58 I.D. 426 (1943). But that does not give rise to a right in disappointed applicants to have him reconsider. Nor does the fact that in the instant case the petition was rejected in writing serve to reinstate appellants' cause. The rejection was no more than an orderly manner of indicating that the communication had been received.

Even if there had been a practice within the Department permitting such petitions, this one was filed too late. Certainly in the face of an Act of Congress establishing a 90-day period for bringing suit, a longer period for filing such petitions from adverse decisions cannot be implied. Indeed, such an implication tolling the running of the statutory period would effectively emasculate the statute.

In short, the petition could not toll the running of the statutory period, because the time had elapsed by the time the petition was filed and there was no time left to be tolled. *Cf. Conboy* v. *First Nat. Bk. of Jersey City*, 203 U.S. 141 (1906).

Accordingly, the action should be dismissed as having been commenced too late.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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ANSWER TO PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

ANSWER TO PETITION FOR REHEARING

Appellants submit the following in answer to the Petition for Rehearing filed by appellee Secretary of the Interior in the above matter:

1. The appellee does not challenge the merits of the decision by the Court nor offer any new argument with respect thereto which he seeks to have this Court consider on rehearing. To the contrary, the appellee states that he has consented to filing this motion for rehearing for the purpose of giving parties to other cases pending in the Court an opportunity to present their views in this proceeding (Petition par. 3). Appellants submit that this attempt to permit strangers to the present action to file, in effect, a petition for rehearing of the Court's decision herein, is an

improper use of the procedures of this Court which implicitly limit such petitions to those who are parties to the action.*

2. The pending Duesing cases were expressly brought to the attention of this Court by the appellee in his brief in this action in support of appellee's contention, rejected by the Court, that the northern part of the Reserve was open to oil and gas leasing prior to 1958. Appellee's brief stated:

> "It should be noted that, with respect to oil and gas leasing on this very reserve, in Duesing v. Udall (No. 17,358), now pending before this Court, some 50 applicants, as well as the Secretary, have assumed that land included within the 1941 withdrawal has at all times since been open for the filing of lease offers." (Appellee's Brief, p. 11 n. 2.)

Thus, even assuming the appellee is correct on the effect of the present decision on the Duesing cases, this provides no new ground for rehearing beyond that expressly urged by appellee prior to the Court's decision herein.

3. The Duesing cases involve different parties, lands, and issues to those of the instant case. The dissimilarity of parties precludes any res judicata effect of the present decision. Furthermore, the lands involved in the present case lie in the northern portion of the Moose Reserve, while all of the lands involved in the Duesing cases are located in the southern portion of the Reserve which the Secretary's order of July 24, 1958

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* See also appellants' Answer to the Petition to Intervene, filed herein by appellant in case No. 17,358, Duesing v. Udall

(23 F. R. 5883) expressly stated "are not opened to oil and gas leasing." The chief issue in the Duesing cases is whether the Secretary acted properly in 1958 in keeping the southern part of the Reserve closed while opening the northern portion. This issue in Duesing is different from the issue decided in the present case involving conflicting offers to lease lands which the Secretary admitted were now open to oil and gas leasing. Thus it does not necessarily follow that the decision in the present case would preclude an adjudication in Duesing that the southern part of the Reserve is now properly open to oil and gas lease offers.

4. The suggestion by the appellee that the opinion "might jeopardize investments in producing oil wells made under leases applied for during the period in question" provides no ground for rehearing. If the appellee means to refer to the effect of the present decision on leases to lands other than those directly involved in the present action, it is clear that this involves a completely separate case clearly not relevant to the present case.* If, on the other hand, the appellee means to refer to any drilling activity on the lands under adjudication in this case,** this could not bear on the merits of the Court's decision. In Pan American Petroleum Corp. v. Pierson, 284 F. 2d 649, 655 (10th Cir. 1960) the

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* The issue there would be whether leases issued under an erroneous construction of law not contested by counter applicants for leases are subject to retroactive invalidation. See Safarik v. Udall, 113 U. S. App. D. C. 68, 304 F. 2d 944 (1962) cert. denied 371 U. S. 901.

** As of the date of this Court's decision on September 19, 1963, appellants had no notice or knowledge of any drilling activity or other investments by any of the adverse lease holders in the lands nor was any such activity suggested either in this Court, the court below, or in the proceedings before the Secretary.

Tenth Circuit relied on a similar type of argument to support its conclusion that the Secretary of Interior had no authority to administratively cancel outstanding leases without judicial proceedings. The Supreme Court overruled this conclusion in Boesche v. Udall, 83 S. Ct. 1373, 10 L ed. 2d 491 (1963) in affirming a decision of this circuit (112 App. D. C. 344, 303 F. 2d 204), noting that in proceedings by competing applicants for the same land the opponent lessee is fully notified under Departmental regulations of the administrative proceedings which are subject to judicial review (See 10 L ed. 2d at 499-500). In this case each of the adverse lease holders to appellants* was notified of these proceedings pursuant to the Department's regulations.** These adverse lease holders, while having a right to seek timely intervention in the subsequent judicial review proceedings in the District Court. (see Safarik v. Udall, 113 U. S. App. D. C. 68, 304 F. 2d 944, 948 cert. denied 3710 S. 901) made no effort to intervene. Having waived this right they should not in effect be heard now in the guise of a petition for rehearing by the Government.

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* Appellants' offers were filed prior to the issuance of these leases.

** In addition, a copy of appellants' Petition for Exercise of Supervisory Authority was served by certified mail on each of the adverse lease holders.

For these reasons, the Court should deny the petition.

Respectfully submitted.

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October 4, 1963

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing appellants' Answer to Petition for Rehearing was served on Edmund B. Clark. Justice Department, Washington, D. C., 20530. Attorney for Appellee by depositing in the mail, postage prepaid, and one copy to Max Barash. Attorney for Bert F. Duesing, Appellant Case No. 17,358 by depositing in the mail, postage prepaid, this 4th day of October, 1963.

Charles F. Wheatley, Jr.

Charles F. Wheatley, Jr.